TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. [redacted]43.

JOSEPH A. LEDERER, PLAINTIFF IN ERROR,

vs.

JAMES M. YOUNG, TRUSTEE.

IN ERROR TO THE SUPREME COURT OF [redacted] STATE OF [redacted]

FILED [redacted], 1913.

([redacted])

(20,636.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 265.

JOSEPH A. LEMIEUX, PLAINTIFF IN ERROR,

vs.

JAMES M. YOUNG, TRUSTEE.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1907.

1 JOSEPH A. LEMIEUX, Plaintiff in Error,
vs.
JAMES M. YOUNG, Trustee, Defendant in Error.

Petition for Writ of Error.

To the Hon. David J. Brewer, Associate Justice of the Supreme Court of the United States:

The petition of the above named plaintiff in error showeth that at the October term A. D. 1906, on or about the seventeenth day of January A. D. 1907, the Supreme Court of Errors of the State of Connecticut, the highest Court of that State in which a decision could be had, entered a final judgment herein in favor of the defendant in error James M. Young, Trustee, and agsinst the plaintiff in error, in which certain judgment certain errors were committed to the prejudice of the plaintiff in error, among which are these, to wit, in deciding against the right specially set up and claimed by the plaintiff in error under section one of article 14 of the articles in addition to and amendment of the Constitution of the United States of America, and under the provisions thereof that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in so defiding against said right, said Supreme Court of Errors decided adversely to the plaintiff in error as follows:

1st. In overruling the claims of law made by the plaintiff in error to said Supreme Court of Errors, that chapter 286 of the
2 General Statutes of Connecticut as amended by chapter 82 of the Public Acts of 1903 of the General Assembly of Connecticut, under and by virtue of which a sale of merchandise in bulk to the said plaintiff by one Hendrick was held to be invalid by said Court of Errors, is in contravention and violation of said article fourteen section 1 of the Constitution of the United States of America as being in derogation of the rights, privileges, liberty and immunities of said plaintiff in error as provided therein.

2nd. In said Supreme Court of Errors holding and deciding, contrary to the claims of the plaintiff in error, that the provisions of said amended statute which are, and being as follows: "No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or deliver-, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so

sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto" are not in conflict with or violative of said section 1 of *sai* said article fourteen, and that the enforcement of said amended statute is not in abridgment of or in violation of the rights, liberty, privileges or immunities of the plaintiff in error, or any legal infringement of his property or other rights under said section 1 of said article fourteen of the Constitution of the United States.

3 Wherefore the plaintiff in error prays that a writ of error may issue in his behalf to the Supreme Court of Errors of the State of Connecticut, for the correction of errors complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN J. PHELAN,
CHARLES F. THAYER,
Attorneys for the Plaintiff in Error.

February 21st, 1907.

4 [Endorsed:] Supreme Court of the United States. No. —. Joseph A. Lemieux, Plaintiff in Error, *vs.* James M. Young, Trustee, Defendant in Error. Petition for Writ of Error. John J. Phelan Charles F. Thayer Attorneys for the Plaintiff in Error. Bridgeport, Conn.

5 JOSEPH A. LEMIEUX, Plaintiff in Error,
vs.
JAMES M. YOUNG, Trustee, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

The plaintiff in error makes the following assignment of errors, which he avers accrued in the final Judgment of The Supreme Court of Errors of the State of Connecticut, at its October term A. D. 1906, on or about the seventeenth day of January A. D. 1907 herein.

That error was committed in deciding against the right specially set up and claimed by the plaintiff in error under section one of article 14 of the Articles in addition to and amendment of the Constitution of the United States of America, and under the provisions thereof that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, no*t* shall any State deprive any person of life, l*i*berty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" and in so deciding against said right said Supreme Court of Errors decided adversely to the plaintiff in error, as follows:

1st. In overruling the claims of law made by the plaintiff in error to said Supreme Court of Errors, that chapter 286 of the General Statutes of Connecticut as amended by chapter 72 of the Public Acts of 1903 of the General Assembly of Connecticut, under and by virtue of which a sale of merchandise, in bulk, to the said

plaintiff in error by said Court of Errors, is in contravention and violation of said article 14 section one of the Constitution of
6 the United States of America as being in derogation of the rights, privileges, liberty and immunities of said plaintiff in error as provided therein.

2nd. In said Supreme Court of Errors holding and deciding, contrary to the claims of the plaintiff in error, that the provisions of said amended statute which are, and being as follows: "No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto" are not in conflict with or violative of said section one of said article 14, and that the enforcement of said amended statute is not in abridgement of or in violation of the rights, liberty, privileges or immunities of the plaintiff in error or any legal infringement of his property or other rights under section one of article 14 of said Constitution of the United States, and the plaintiff in error prays that the Judgment aforesaid may be reversed, annulled, and altogether be held for nothing, and that he may be restored to all things which he has lost by occasion of said Judgment.

JOHN J. PHELAN,
CHARLES F. THAYER,
Attorneys for the Plaintiff in Error.

February 21st, 1907.

[Endorsed:] Supreme Court of the United States. No. —. Joseph A. Lemieux, Plaintiff in Error, *vs.* James M. Young, Trustee, Defendant in Error. Assignment of errors and Prayer for Reversal. John J. Phelan Charles F. Thayer Attorneys for Plaintiff in Error Bridgeport, Conn.

7 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of The United States of America to the Honorable the Judges of the Supreme Court of Errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Errors, before you or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between James M. Young, Trustee, of Norwich, New London County, Connecticut, plaintiff, now defendant in error, and

Joseph A. Lemieux of Baltic, New London County, Connecticut, defendant, now plaintiff in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath

8 happened, to the great damage of the said plaintiff in error, Joseph A. Lemieux, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States the 21st day of February in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice.

[Endorsed:] Supreme Court of the United States. No. —. Joseph A. Lemieux, Plaintiff in Error, *vs.* James M. Young, Trustee, Defendant in Error. Writ of Error. —— ——, —— ——, Attorneys for Plaintiff in Error. Bridgeport, Conn.

9 UNITED STATES OF AMERICA, *ss:*

To James M. Young, Trustee, of Norwich, New London County, Connecticut, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Errors of the State of Connecticut, wherein Joseph A. Lemieux is plaintiff in error and you are defendant in error, to show cause, if any there be, why the

judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer Associate Justice of the Supreme Court of the United States this 21st day of February in the year of our Lord one thousand nine hundred and seven.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

10 On this 7th day of March in the year of our Lord one thousand nine hundred and seven, personally appeared Gilbert S. Raymond before me, the subscriber, a Notary Public for the State Of Connecticut, and made oath that he delivered a true copy of the within citation to James M. Young, Trustee, the said defendant in error.

Sworn to and subscribed this 7th day of March 1907.

[Seal of Charles F. Thayer, Notary Public, Norwich, Connecticut.]

CHAS. F. THAYER,
Notary Public for the State of Connecticut.

This is to certify that a copy of the within citation was served on me this day.

JAMES M. YOUNG, *Trustee.*

Norwich, Conn., March 7, 1907.

DISTRICT OF CONNECTICUT:

NORWICH, CONNECTICUT, *March* 7, 1907.

I certify that I served the within citation by leaving a true and attested copy thereof, in the hands of James M. Young, Trustee.

GILBERT S. RAYMOND.
A Person Indifferent.

Fees.

Travel, 2 miles	$0.20
Service	.12
Endorsement	.24
1 Copy	.25
Total	0.81

11 [Endorsed:] Supreme Court of the United States. No. —. Joseph A. Lemieux, Plaintiff in Error, *vs.* James M. Young, Trustee, Defendant in Error. Citation. —— ——, —— ——, Attorneys for Plaintiff in Error. Bridgeport, Conn.

12 Know all men by these presents that we, Joseph A. Lemieux of Baltic, New London County, Connecticut, and Charles F. Thayer of Norwich in said County & State are held and firmly bound unto James M. Young, Trustee, in the full and just sum of Five Hundred Dollars to be paid to the said Obligee, James M. Young, Trustee, his attorneys and assigns or successors, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this Sixteenth day of February one thousand nine hundred and seven.

Whereas lately at a session of the Supreme Court of Errors of the State of Connecticut in a suit, in said court between James M. Young, the Obligee, defendant in error, and Joseph A. Lemieux, the principal of this bond, Obligors, plaintiff in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to said defendant in error, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs if he fails to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH A. LEMIEUX.
CHAS. F. THAYER.

Signed and delivered in presence of
PHILIP E. HENDRICK.
GILBERT S. RAYMOND.

13 STATE OF CONNECTICUT, *County of New London, ss:*

Personally appeared the above-named Joseph A. Lemieux, and Charles F. Thayer of Norwich, who, being duly sworn, depose and say, that he, the said Thayer is worth the sum of Five Hundred Dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

JOSEPH A. LEMIEUX.
CHAS. F. THAYER.

Subscribed and sworn to before me this 16th day of February 1907.

GILBERT S. RAYMOND
Notary Public.

Feb'y 21st, 1907.

Approved by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

14 & 15 To all persons to whom these presents shall come, Greeting:

In pursuance of the within writ of error, I John C. Averill, Clerk of the Supreme Court of Errors, within and for the Second Judicial District of the State of Connecticut, herewith transmit a true copy of the record and all proceedings in the case of James M. Young, Trustee against Joseph A. Lemieux, lately pending in the Supreme Court of Errors within and for the Second Judicial District of the State of Connecticut, including the transcript of opinion of said Court and the dissenting opinion by Hon. Wm. Hamersley, an Associate Justice of said Court as certified to by James P. Andrews, Esq. Official Reporter and lodged on file in this office, in the words and figures following, to wit:

In testimony whereof, I hereunto set my hand and affix the seal of said Court at Norwich in said Second Judicial District of the State of Connecticut, this 18th day of March A. D. 1907.

[Seal Supreme Court of Errors, Conn.]

Attest,

JOHN C. AVERILL,
Clerk of the Supreme Court of Errors in and for the Second Judicial District of the State of Connecticut.

16 Supreme Court of Errors, Second Judicial District, New London County, October Term, A. D. 1906.

Superior Court, New London County, November Session, 1905.

JAMES M. YOUNG, Tr.,
vs.
JOSEPH A. LEMIEUX.

To the Sheriff of the County of New London, his Deputy, or either Constable of the Town of Norwich, in said County, Greeting:

By authority of the State of Connecticut, you are hereby commanded, without delay, to cause to be replevied to James M. Young, of said Town of Norwich, as he is the trustee in Bankruptcy of the bankrupt estate of Philip E. Hendrick of said Town of Norwich, by appointment of the United States District Court for the District of Connecticut, duly made in November, 1904—certain goods and chattels, to wit:

Six show-cases, with the contents of the same, now in the drug store on Merchants avenue at Taftville, in said town of Norwich in the building owned by George H. Pratt and situated at the junction of said Merchants avenue and of Hunter avenue; also all the display cases, composed of wood and glass, and situated now in said store, together with all the contents of said display cases; the desks in said store; three thousand glass jars in said store, together with the drugs and medicines therein; a lot of miscellaneous proprietary medicines

with the receptacles containing the same now in said store; a lot of brushes; a lot of miscellaneous toilet articles; a lot of wines, liquors and cigars, together with the receptacles containing the same;
17 a lot of powders, plasters, pills, barks, and miscellaneous drugs and medicines; and all the other articles of personal property now situated and contained in said drug store—of the value of three thousand five hundred dollars, now in the possession of Joseph A. Lemieux of said town of Norwich at said Taftville in said town, and by him wrongfully detained, and also to attach the goods or estate of said Joseph A. Lemieux to the value of six hundred dollars, and him summon to appear before the Superior Court to be held in and for said County of New London on the first Tuesday of February, A. D. 1905, then and there to answer unto said James M. Young of said town of Norwich, as he is the trustee in Bankruptcy, of the bankrupt estate of Philip E. Hendrick of said town of Norwich, bankrupt, by appointment duly made by the District Court of the United States for the District of Connecticut in November, 1904, in a plea of replevin, wherein the plaintiff declares and says:

That ever since the 5th day of November, 1904, the defendant has wrongfully detained and still wrongfully detains from the plaintiff said goods and chattels, being the property of the plaintiff, as such trustee as aforesaid; and that the plaintiff on said day was, and ever since has been lawfully entitled to the immediate possession thereof; to his damage in the sum of six hundred dollars; to recover which damages, with costs, as well as the possession of said goods and chattels, he brings this suit.

Hereof fail not, but make due service and return.

Dated at Norwich, Conn., this 5th day of January, A. D. 1905.

THOMAS J. KELLY,
Justice of the Peace.

STATE OF CONNECTICUT. *County of New London, ss:*

TOWN OF NORWICH, *January 5th*, 1905.

Jeremiah J. Desmond of said town of Norwich, being duly sworn, deposes and says that he believes that James M. Young of said town of Norwich as trustee in Bankruptcy of the bankrupt estate
18 of Philip E. Hendrick of said Norwich, by appointment of the United States Court for the District of Connecticut, is entitled to the immediate possession of the following described goods and chattels, namely:

Six show-cases, with the contents of the same, now in the drug store on Merchants avenue at Taftville in said town of Norwich in the building owned by George H. Pratt and situated at the junction of said Merchants avenue and of Hunter avenue; also all the display cases, composed of wood and glass, and situated now in said store, together with all the contents of said display cases; the desks in said store; three thousand glass jars in said store, together with the drugs and medicines therein; a lot of miscellaneous proprietary medicines with the receptacles containing the same now in said store; a lot of brushes; a lot of miscellaneous

toilet articles; a lot of wines, liquors and cigars, together with the receptacles containing the same; a lot of powders, plasters, pills, barks and miscellaneous drugs and medicines; and all the other articles of personal property now situated and contained in said drug store; that said deponent knows the nature and value of said goods and chattels; and that their true and just value, as nearly as the deponent can estimate it, is three thousand five hundred dollars.

JEREMIAH J. DESMOND, *Deponent.*

Subscribed and sworn to on this 5th day of January, A. D. 1905, at said Norwich, before me.

THOMAS J. KELLY,
Justice of the Peace.

Be it remembered that at the town of Norwich in the County of New London in the State of Connecticut, on the 5th day of January, 1905, there personally appeared before me, Jeremiah J. Desmond of said town of Norwich, as principal, and Lucius Brown of said town of Norwich, as surety, which surety is known to me 19 to be of sufficient pecuniary responsibility to respond to the amount of this recognizance, and acknowledged themselves jointly and severally bound unto Joseph A. Lemieux of said town of Norwich, in a recognizance of eight thousand dollars, that James M. Young, of said Norwich as trustee in Bankruptcy of the bankrupt estate of Philip E. Hendrick of said Norwich, by appointment of the United States Court for the District of Connecticut, who prayed out the foregoing writ of replevin against said Joseph A. Lemieux, shall prosecute his suit to effect, and shall pay to said Joseph A. Lemieux any judgment that said Joseph A. Lemieux may recover in said suit and return to said Joseph A. Lemieux the goods and chattels that may be replevied under said writ, and pay to him all damages that he may sustain by the replevying thereof, if said James M. Young, as such trustee as aforesaid, fail to establish his right to the possession of the same in said suit.

THOMAS J. KELLY,
Justice of the Peace.

Superior Court, New London County, September 28th, 1905.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Answer.

The defendant denies the truth of the matters alleged in the plaintiff's writ of complaint.

THE DEFENDANT,
By F. T. BROWN,
His Attorney.

Filed Sept. 28, 1905.

JOHN C. AVERILL, *Clerk.*

2—265

20 New London County, Superior Court, February 3d, 1906.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Memorandum of Decision.

This is an action of replevin brought by Young as trustee in bankruptcy of one Hendrick against the defendant for the recovery of the stock of a drug store in Taftville claimed to belong to the plaintiff as such trustee.

The defense is the general issue.

The property replevied is claimed to have been sold by Hendrick to the defendant August 31, 1904, and to have been in his possession and subject to his disposal as a retail drug store until replevied on or about the 25th of January, 1905.

The plaintiff bases his right to recover upon two grounds; first, that the sale was in violation of Chapter 72 of the Acts of 1903, and also that it was fraudulent under Subsection E of Section 67 of the Bankruptcy Act.

It appears from the evidence that Hendrick, the plaintiff's insolvent, on August 31st, 1904, sold the whole of his retail drug business to the defendant. At that time Hendrick was conducting a general retail store as one part of his business, and a separate and separately located retail drug store under a separate name as another part of his business. The facts bring this drug business within the language, "The whole or a large part of his stock in trade," as found in Chapter 72, Acts of 1903. This sale was made without recording notice of intention to sell as prescribed by said Act. I think, therefore, that the sale was void under Section 4869 of the Statutes, which provides that sales in violation of Chapter 72 referred to shall be null and void as against all persons who are creditors of the vendor at the time of such transaction. The insolvency of Hendrick
21 dates from September 19, following the sale, and the plaintiff can maintain his action because of the invalidity of the sale under said statute.

It was claimed upon argument that Chapter 72 was unconstitutional. It differs not very materially from the Act referred to in Walp against Mooar, 76 Conn., page 520. Under the general language there used I should not at all feel warranted in supporting the defendant's claim of unconstitutionality.

The plaintiff further claims the right to recover under subsection E, Section 76, of the Bankruptcy Law. Perhaps it is immaterial in view of the ruling upon the claim under Chapter 72 of the Acts of 1903, but as the claim was made and argued fully, and there was considerable evidence upon the question, perhaps I ought to say that I do not think the plaintiff has made out a case under this section for it does not sufficiently appear that the sale by Hendrick

was "with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them."

I must find that the sale was proposed to the defendant as early as June; that the defendant ran the business during July and August with the idea held out to him of buying if he liked it; and that on August 31st in pursuance of the suggestion made the preceding June he did buy. It further appears that at this time Hendrick had no notion that he was insolvent and that he had no such notion until about the 19th of September when his attorneys advised him that he was insolvent under the Bankruptcy Law. Nor does it appear that his sale was to hinder or delay creditors apart from the question of the insolvency. As to this part of it it is perhaps sufficient to say that the plaintiff has not made out his case. The only testimony upon that is that of the defendant and of Hendrick, and Hendrick's testimony as to the use of the notes given and discounting them is consistent with his claim, and is not attacked by any of the facts shown by the plaintiff, which, it seems to me, could have been shown without much difficulty had Hendrick's claim been
22 untrue, as to his use of the proceeds of the notes given by the defendant and which he procured to be discounted.

So that I hold the plaintiff has not made out a case of fraud under the Act referred to or of a fraudulent sale of any sort.

One other question is raised with reference to the specific goods replevied. It appears that between August 31st, and the time that the sheriff took possession under the writ of replevin, the defendant sold goods at retail and bought goods with the proceeds to take the place of those sold; and that at the time of the replevy the defendant refused to give any information as to what goods he claimed to have put in, both to the trustee and to the sheriff, and made no specific claim as to any goods; and it further appears that all goods put in by him were put in from the proceeds of the sales of goods that he bought from Hendrick, and that he did not invest a dollar of his own money in the store; in fact at the time of the purchase the defendant was insolvent, taking the store in his name as agent to protect himself from his own creditors. Of the goods put in a large portion were so mixed and commingled with goods already in the store as to be physically impracticable of separation, and others were bottles, boxes and packages of kinds similar to those already in the store, and not easily distinguishable.

I think there was a commingling of the property in such a way that, taken in connection with the defendant's refusal to specify or make any claims upon property put in by him the replevin suit should hold it. Further, I think that the defendant's claim as to the specific property is extremely untrustworthy from the manner in — and the time when it was made out.

Judgment for the plaintiff for the possession of the goods replevied and one dollar nominal damage, no evidence having been offered of substantial damage.

GAGER, *J.*

23 Superior Court, New London County, November Session, 1905, February 3d, 1906.

JAMES M. YOUNG, of Norwich, Connecticut, Trustee of Bankrupt Estate of Philip E. Hendrick,

vs.

JOSEPH A. LEMIEUX, of Norwich, Connecticut.

Judgment.

This action for the replevin of certain personal property and claiming $600. damages for the detention of the same, as appears from said writ of replevin on file, came to this Court on the first Tuesday of February, 1905, and thence by continuance to the present time when the parties appeared and were at issue to the Court on the general issue without notice as on file.

The Court having heard the parties finds the issues in favor of the plaintiff.

Whereupon it is adjudged that the plaintiff is entitled to, and retain possession of said property replevied and that he recover of the defendant the sum of One Dollar, nominal damages, and his costs, taxed at —— dollars —— cents.

By the Court,

JOHN C. AVERILL, *Clerk.*

24 Superior Court, New London County, February 9th, 1906.

JAMES M. YOUNG, Trustee,

vs.

JOSEPH A. LEMIEUX.

Notice of Appeal.

In the above entitled action the defendant hereby gives notice that he appeals from the judgment of the Superior Court therein to the Supreme Court of Errors next to be holden in and for the Second Judicial District of Connecticut.

THE DEFENDANT,
By PHELAN & THAYER,
His Attorneys.

Filed Feb'y 10, 1906.

JOHN C. AVERILL, *Clerk.*

New London County Superior Court, March 26th, 1906.

JAMES M. YOUNG, Tr.,
vs.
JOSEPH A. LEMIEUX.

Finding.

First.

1. The plaintiff is the Trustee of the bankrupt estate of P. E. Hendrick, adjudicated a bankrupt by the United States District Court for the District of Connecticut on October 10th, 1904, in involuntary proceedings, upon the petition of sundry creditors, dated September 19th, 1904.

2. On August 31st, 1904, and for some years prior thereto said Hendrick conducted at Taftville, Connecticut, a general store and meat market, carrying boots and shoes, meats, fresh and cured, flour and provisions, hay and grain, furniture, groceries, clothing and dry goods, patent medicines, and some common drugs in bulk such as are usually kept in a general store in a large village.

3. Said Hendrick personally conducted this store and had for some years, and it was situated in his building and carried on in his name, and his name as proprietor was on the building over the store entrance.

4. On said August 31st, 1904, said Hendrick also owned and was engaged in conducting, under the name and style of The Taftville Drug Company, a drug store in a separate store and building hired by him on the opposite side of the street some three hundred feet distant from his general store.

5. This drug store had been owned by said Hendrick some years, and he carried on the same through a licensed druggist employed by him, as a separate and independent business apart from the general store hereinbefore referred to.

6. In conducting both said general store and said drug store said Hendrick made it his business to buy commodities and sell the same in small quantities for the purpose of making a profit.

7. On said day the value of the stock in said general store was about $2,000, and the value of the stock, fixtures and soda fountain in said drug store was about $3,500.

8. On said date the defendant, a licensed druggist, was running said drug store as clerk of said Hendrick and had been so employed for two months, and had originally been induced to come to and had remained at said store under the prospect of eventually buying out the same from said Hendrick. Said defendant had no property, had previously failed in business and was still owing debts on account of the same, for which reason the notes hereinafter referred to were signed by him as agent.

9. On said August 31st, 1904, said Hendrick, at a single transaction and not in the regular course of business and without any

written bill of sale, sold, assigned and delivered to said Lemieux said drug store and the whole of his stock in trade, fixtures and soda fountain therein for the price of $3,500.

10. The defendant paid to said Hendrick about $50 in cash and a small check endorsed to him, and delivered to him one note for $2,000, payable to said Hendrick in five days, and one for
26 $1,400, payable to said Hendrick in seven days and both notes were signed by the defendant as agent.

11. It was further understood and agreed between the defendant and said Hendrick that the defendant should not be called upon to pay said notes before January 1st, 1905, and the defendant has never in fact paid said notes, nor did it appear that they had ever been presented to him for payment.

12. Said sale was not made with intent to hinder, defraud or delay creditors, nor in contemplation of insolvency. Nor was it otherwise voidable than for failure to conform to the requirements of the statute of this state as hereinafter set forth.

13. After said sale said Hendrick procured said notes to be discounted. It did not appear specifically what use was made of the money, but from the evidence I am unable to find that it was not used by him in connection with his business.

14. At the time of said sale said Hendrick owed debts to a large amount and was being pressed by his creditors, but he did not at that time believe that he was in fact insolvent.

15. At the time of said transfer of the drug store the amount of the debts owed by said Hendrick and outstanding other than mortgage notes, was about $22,068, which debts then so existing were subsequently proved against his bankrupt estate in the aforesaid bankruptcy proceedings, and said bankruptcy proceedings were pending at the time of the institution of the present suit.

16. The property of said bankrupt in the hands of said trustee in bankruptcy is wholly insufficient to pay the claims of said creditors presented in the course of said bankrutpcy proceedings.

17. Said Hendrick closed his general store on account of his failing circumstances on or about September 16th, 1904, and possession of said general store was taken by a deputy sheriff under a writ of attachment on September 19th, 1904.

18. The defendant after said purchase on August 31st, 1904, continued to conduct said store under the sign of The Taftville Drug Company. From the receipts he paid rent, procured
27 and distributed calendars marked "Taftville Drug Company, J. Lemieux, Proprietor," got the stock insured and a receipt for the policy, and generally conducted the business as proprietor. From time to time, from the receipts of the business, he purchased drug stock in small amounts to keep up an assortment, mingling the stock so purchased with that bought by him from said Hendrick. He also drew about $16 per week for living expenses.

19. Neither said Hendrick nor said Lemieux on said August 31st, 1904, or at any other time, caused to be recorded in the Town Clerk's office in the Town of Norwich, in which said Hendrick conducted his said drug business, any notice of his inten-

tion to make such sale, assignment or delivery, as required by Chapter 72 of the Public Acts of 1903.

20. The plaintiff, as Trustee in Bankruptcy of said Hendrick, replevied the stock of goods in said drug store bought by said Lemieux of said Hendrick, as aforesaid, located in said building in which said drug business was separately conducted as aforesaid, on or about the 25th day of January, 1902.

21. No evidence was offered to show the separate values of either the stock, the fixtures or the soda fountain, but the same were valued as one entirety, as a going concern.

Second.

The following conclusions have been reached from the foregoing facts:

1. The sale of said drug business by said Hendrick to said Lemieux, otherwise than for the provisions of Chapter 72 of the Public Acts of 1903, was valid.

2. The drug business carried on by said Hendrick in the separate or leased building falls within and is covered by the language, "The whole or a large part of his stock in trade," as found in Chapter 72, Public Acts of 1903.

3. The sale of said drug store by said Hendrick to said Lemieux was void under the provisions of Chapter 72 of the Public Acts of 1903, and section 4869 of the General Statutes.

28 4. The plaintiff as Trustee in bankruptcy was entitled to maintain the action of replevin for said stock of said drug store.

Third.

The defendant made the following claims of law respecting the judgment to be rendered:

1. That Chapter 72 of the Public Acts of 1903 did not apply to the sale in question, and as a consequence no notice of intention to sell was necessary as in said Chapter provided, because the sale was not and did not constitute the whole or a large part of his stock in trade on the date of said sale.

2. That said Chapter 72 of the Public Acts was void because in conflict with both the Federal and State Constitutions.

The Court overruled both of said claims and rendered judgment as on file.

GAGER, J.

Finding received March 28th, 1906.

GEO. E. PARSONS,
Ass't Clerk.

Refiled July 26, 1906.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, August 8, 1906.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Appeal.

In the above entitled cause the defendant appeals from the judgment of said Court to the Supreme Court of Errors next to be holden within and for the Second Judicial District on the third Tuesday in October, 1906, for the revision of the errors which he claims to have occurred in the trial thereof; and for reasons of said appeal he assigns the following, viz.:

1. The Court erred in concluding from the facts found that "the drug business carried on by said Hendrick in the separate or
29 leased building falls within and is covered by the language," the whole or a large part of his stock in trade "as found in Chapter 72, Public Acts of 1903," and in overruling the claim of the defendant "that Chapter 72 of the Public Acts of 1903 did not apply to the sale in question, and as a consequence no notice of intention to sell was necessary as in said Chapter provided, because the sale was not and did not constitute the whole or a large part of his stock in trade on the date of said sale."

2. The Court erred in concluding from the facts found that "the sale of the drug store by said Hendrick to said Lemieux was void under the provisions of Chapter 72 of the Public Acts of 1903 and Section 4869 of the General Statutes."

3. The Court erred in overruling the defendant's claim "that said Chapter 72 of the Public Acts of 1903 was void because in conflict with both the Federal and State Constitutions."

He therefore prays for such relief as is provided by law in the premises.

JOSEPH A. LEMIEUX,
By JOHN J. PHELAN,
CHAS. F. THAYER,
His Attorneys.

I certify that the foregoing appeal was filed on the 11th day of August, 1906, and Charles F. Thayer, of Norwich, is recognized in the sum of $100., conditioned that the said Joseph A. Lemieux shall prosecute said appeal to effect, and pay all costs therein if he shall fail so to do; and said appeal is hereby allowed.

JOHN C. AVERILL, *Clerk.*

A correct copy of record of the Superior Court.

JOHN C. AVERILL, *Clerk.*

A correct copy of record of the Supreme Court of Errors.

JOHN C. AVERILL, *Clerk.*

30 Superior Court.

No. 3.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Defendant's Appeal.

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31 Supreme Court of Errors, Second Judicial District, October Term (October 5, 1906).

JAMES M. YOUNG, Trustee,
vs.
JOSEPH LEMIEUX.

Plea in Abatement.

The appellee, James M. Young, Trustee, pleads in abatement of defendant's appeal in the above entitled action, because,

1. A finding of facts was necessary on the appeal in the above entitled action and said finding of facts was refiled and finally filed with the clerk of said Superior Court by the Judge of said Superior Court making said finding on July 26th, 1906, and the defendant, the party giving notice of said appeal, was thereupon on said July 26th, 1906, notified that said finding had been so re-filed and filed by the clerk of said Court, and this appeal was not filed within ten days from the time said finding was so filed and the defendant notified thereof by said clerk and was not filed until August 11th, 1906, and so was filed more than ten days after the time when said finding was so filed and the defendant notified thereof by said clerk and the Judge of said Superior Court so filing said finding had not extended and did not extend the time for filing such appeal.

And therefore the appellee prays judgment.

JAMES M. YOUNG, *Trustee*,
By J. J. DESMOND &
BROWN & PERKINS,
His Attorneys.

Filed October 11th, 1906.
JOHN C. AVERILL,
Clerk of Supreme Court.
3—265

32 Supreme Court of Errors, Second Judicial District, Octobe
Term, 1906.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH LEMIEUX.

Answer to Plea in Abatement.

1. So much of the plea in abatement as alleges that the findin was refiled on July 26, 1906, is denied.

2. So much of said plea as alleges that the party giving notice o said appeal was notified of such refiling by the Clerk on July 2 1906, is denied.

3. So much of said plea as alleges that more than ten days elapse before the filing of the appeal after the defendant had been notifie by the Clerk of the refiling of said finding, is denied.

4. The defendant further says he was not notified of the refilin of said finding by said Clerk until August 1st, 1906, and furth says that said appeal was offered to the Clerk for filing within te days next after August 1st, 1906, to wit, on August 8, 1906.

THE DEFENDANT,
By PHELAN & THAYER,
His Att'ys.

Per P.

Filed October 15th, 1906.
JOHN C. AVERILL,
Clerk Supreme Court, 2nd District.

33 Supreme Court of Errors, Second Judicial District, Octobe
Term, 1906.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Withdrawal of Answer to Plea in Abatement.

The defendant, with permission of the Court, hereby withdraw his answer to the plea in abatement of the plaintiff.

THE DEFENDANT,
By PHELAN & THAYER,
His Att'ys.

Filed October 15th, 1906.
JOHN C. AVERILL,
Clerk of Supreme Court.

34 Supreme Court of Errors, Second Judicial District, October Term, 1905.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Demurrer to Plea in Abatement.

The defendant demurs to the plea in abatement of the plaintiff because of the insufficiency thereof and because by the provisions of Chapter 24 of the Public Acts of 1905, it is not necessary to file the appeal at the time set forth, as in said plea alleged, but that the filing of said appeal and "All proceedings to make or complete the record on such appeal shall be suspended during the months of July and August."

THE DEFENDANT,
By PHELAN & THAYER,
His Att'ys.

Filed October 15th, 1906.
JOHN C. AVERILL,
Clerk of Supreme Court, Second District.

Sustained *per Curiam.* October 16th, 1906.
JOHN C. AVERILL, *Clerk.*

35 At a Supreme Court of Errors of the State of Connecticut in the Second Judicial District, held at Norwich, in the County of New London, on the 3rd Tuesday of October, 1906.

No. 3.

JAMES M. YOUNG, Trustee of the Bankrupt Estate of Philip Hendrick, of Norwich, Conn.,
vs.
JOSEPH A. LEMIEUX, of Norwich, Conn.

On Appeal from the Superior Court, November, 1905, Session, New London County.

This appeal by the defendant claiming error in the process, record, and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Clerk of the Superior Court for New London County on the 11th day of August, 1906, and came to this Court at its term at Norwich, on the third Tuesday of October, 1906; when the parties appeared and were fully heard.

And now this Court finds that in the record judgment and proceedings of said Superior Court there is no error.

It is therefore considered and adjudged that the appellee recove
of the appellant $74—costs of suit.

By the Court,

JOHN C. AVERILL, *Clerk.*

Judgment dated January 16th, 1907.

36 Supreme Court of Errors, Second Judicial District, Octobe
Term, Norwich, 1906.

JAMES M. YOUNG, Trustee,
vs.
JOSEPH A. LEMIEUX.

Action of replevin for the possession of the stock and fixtures of
retail drug business, brought to the Superior Court in New Londo
County and tried to the Court, Gager, J.; facts found and judg
ment rendered for the plaintiff, and appeal by the defendant. N
error.

The defendant's demurrer to the plaintiff's plea in abatement
the appeal, sustained.

HALL, *J.:*

The plaintiff is the trustee of the estate of P. E. Hendrick, wh
was adjudicated a bankrupt upon the petition of sundry creditor
dated September 19th, 1904.

On and for some years prior to August 31st, 1904, said Hendric
conducted personally in his own name and in his building in Taf
ville in this State, a retail general store and meat market, and
the same time, in a store hired by him on the opposite side of th
street, carried on a separate and independent retail drug busine
under the name of the Taftville Drug Company, which was manag
by a licensed druggist employed by him.

The value of the stock in the general store was about $2,000, an
of the stock, fixtures and soda fountain in the drug store, abo
$3,500. There was no evidence at the trial of the separate val
of the stock, fixtures and soda fountain.

On August 31st, 1904, said Hendrick, at a single transaction, a
not in the regular course of business, and without any written b
of sale, and without having caused to be recorded the notice of
intention to make such sale required by chapter 72 of the Pub
Acts of 1903, sold and delivered to the defendant said dr
37 store and the whole of his stock, fixtures and soda founta
therein for the price of $3,500, receiving therefor from t
defendant $50 in cash, a small indorsed check, one note for $2,0
payable in five days, and one for $1,400 payable in seven days, bo
being signed by the defendant as agent. It was understood betwe
Hendrick and the defendant that payment of said notes would

be demanded before January 1st, 1905. The defendant has never paid said notes and it did not appear at the trial that payment thereof had ever been demanded.

The defendant had been managing said drug business, as a clerk for Hendrick, for two months before such sale, with the expectation of eventually buying it. He had no property, had previously failed in business, and was owing debts on account thereof, and for that reason signed said notes as agent.

After such purchase the defendant continued to conduct said drug business, purchasing goods in small amounts from time to time from the receipts of the business to keep up the stock, and drawing from the receipts about $16 a week for his living expenses until the goods were replevied by the plaintiff in January, 1905.

At the time of said sale Hendrick was largely indebted and was being pressed by his creditors, but he did not believe that he was in fact insolvent. His general store was closed by attachment on the 16th of September, 1904. The property in the hands of the plaintiff is insufficient to pay the claims of Hendrick's creditors.

The trial court held that the sale to the defendant was not made to hinder or defraud creditors, nor in contemplation of insolvency, but that it was void under Chapter 72 of the Public Acts of 1903 and § 4869 of the General Statutes, and rendered judgment for the plaintiff.

38 In his reasons of appeal the defendant claims that the trial — erred in holding, upon the facts above stated, that the sale of the drug business was a sale by Hendrick of "the whole or a large part of his stock in trade," within the meaning of chapter 72 of the Public Acts of 1903, and was void under said Act and § 4869 of the General Statutes, and in not holding that said Act of 1903 was in conflict with the State and Federal constitutions.

In this court the plaintiff pleaded in abatement of the defendant's appeal that the finding of facts for the appeal was filed and notice thereof given to the defendant on July 26th, 1906, and that the appeal was not filed until August 11th, 1906, and not within ten days after such notice of the filing of the finding.

To this plea the defendant demurred upon the ground that he was not required to file his plea within ten days after July 26th, since chapter 24 of the Public Acts of 1905 provides that "all proceedings to make or complete the record on such appeal shall be suspended during the months of July and August.

The plea in abatement is insufficient. The appeal was filed in time. The filing of the finding in July and of the appeal in August were effective, notwithstanding the provision that all proceedings should be suspended during those months. That provision was not intended to prevent either court or counsel from filing necessary papers to make or complete the record on the appeal, during the months of July and August, to become operative upon the expiration of that period.

As the drug store was not conducted as a part of the business of the general store, but as a separate and independent business, car-

ried on in another building, and under another name, the
39 decision of the trial court that the sale was within the statute, is clearly sustainable upon the ground that it was a sale of Hendrick's whole stock in trade in an independent business.

Section 4869 as amended by chapter 24 of the Public Acts of 1903 is not invalid as conflicting with either the Federal or State constitution.

In 1901 an Act, entitled "An Act concerning Sales of Personal Property," was passed, which provided, in effect, and as afterward stated in § 4868 of the General Statutes, that any sale by such dealer, at a single transaction, and not in the regular course of business, of the whole or a large part of his stock in trade, should be in writing, describing the property sold, and all the conditions of the sale, acknowledged before competent authority, and recorded within one day after the sale in the town clerk's office where the vendor has his place of business, and, as afterward stated in § 4869 of the General Statutes, that such sales made without these formalities should be void as against the creditors of the vendor at the time of the sale. Public Acts of 1901, Chap. 161.

In 1903 an Act was passed, entitled "An Act concerning the Transferring of a Person's Business," which was in force at the time the sale in question was made, and which reads as follows: "Section 4868 of the general statutes is hereby amended to read as follows: No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade unless he shall not less than seven days previous to such sale, assignment or delivery, cause to be recorded in the town
40 clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such a sale, assignment or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned and delivered, and all such conditions of such sale, assignment or delivery, and the parties thereto." Public Acts of 1903, Chap. 72. Said Act neither repealed nor changed § 4869 of the General Statutes.

In 1905 § 4868 of the General Statutes was further amended, so that instead of absolutely prohibiting such sales without such notice, as the language of that section did, it should only render them void as against the vendor's creditors. Public Acts of 1905, Chap. 211, p. 408.

In State *v.* Reynolds, 77 Conn. 131-134, in sustaining, as a valid exercise of the police power of the State, § 1358 of the General Statutes prohibiting any person from exposing for sale from any wagon or temporary stand any article of provisions within one mile from the fair ground of any incorporated society, we expressly approved of the language of the courts of other jurisdictions describing the police power of the State as extending "beyond the *bounds of the* protection of health, peace, morals, education and good order," and as comprehending "all those general laws of internal regulation

necessary to secure the peace, good order, the health and comfort of society, and the regulation and protection of all property in the State" and as the "power to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State * * * and add to its wealth and prosperity." citing State *v.* Harrington, 68 Vt. 622-626 and Barbier *v.* Connelly, 113 U. S. 27-31.

41 In Walp *v.* Mooar, 76 Conn. 515-521, we said of §4868, as it read before it was amended in 1903, that it was not unconstitutional because it applied only to retail dealers, nor as depriving persons of their property without due process of law; that the purpose of the Act was to prevent fraud; that the legislature had the undoubted power to adopt reasonable measures for regulating the sale of merchandise in this State so as to prevent fraud; and that the Act then in question was clearly within that power.

No citizen has an absolute right to sell his property either in such manner or at such time as he may choose. Every person holds his rights, however fundamental they may be, subject to the exercise within constitutional limits of that governmental power vested in the legislature of the State in which he resides, which is commonly called the police power. Crowley *v.* Chrisensen, 137 U. S. 86.

While the exercise of such power by the legislature is only to be justified upon the ground that it is for the public good; that its purpose is the removal of an existing evil; that the provisions of the Act bear a reasonable relation to the evil sought to be cured, and that they are such as are not usually oppressive upon individuals, and do not impose unnecessary restrictions upon lawful occupations, yet when courts are required to pass upon the validity of such legislation it is to be remembered that in the exercise of such police power "a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests" (Lawton *v.* Steele, 152 U. S. 133); that every such law is not to be held void "which may seem to the judges who pass upon it excessive or unsuited
42 to its ostensible end, or based upon conceptions of morality with which they disagree" (Otis *v.* Parker, 187 U. S. 606; Atchison, etc., R. Co. *v.* Matthews, 174 U. S. 96); "that every presumption and intendment is to be made in favor of its validity, and that unless it appears beyond a reasonable doubt to be 'a clear usurpation of power prohibited' it must stand as a valid act." Booth *v.* Illinois, 184 U. S. 425; State *v.* Main, 69 Conn. 123, 135; State *v.* Reynolds, *supra;* State *v.* Feingold, 77 Conn. 326-331.

The manifest purpose of the Act in question is to protect creditors of retail dealers against a class of sales which are often fraudulent, and opportunities for making which are readily afforded by the nature of the retail business and the manner in which it is usually conducted. Walp *v.* Mooar, *supra.* Enactments to prevent such fraudulent transfers are clearly within that class of legislation generally denominated police regulations. In considering whether in passing this particular Act the legislature has transcended the limits of its constitutional authority we are to inquire whether the methods

provided by the Act for curing the existing evil are reasonably appropriate for that purpose and whether they unreasonably infringe upon personal or property rights.

Section 4868 as originally enacted provided no other notice to creditors than by the recording of the bill of sale within one day after the sale. In enacting the amendment of 1903 the legislature probably believed that a notice before the sale would be a much more effectual means of enabling creditors to protect their rights than a notice after the sale had been made.

It may be that this Act approaches the verge of legislative power, but we cannot say that its requirements as to the manner and time of giving notice of the sale are so clearly unreasonable or so unnecessarily burdensome as to compel us to hold that any con-
43 stitutional rights have been infringed. It cannot be said that such notice as creditors would receive from the recording seven days before the sale of a notice of his intention to sell by the vendor, would give them an unnecessarily long time, to take steps to protect their interests.

Although by the language of the amendment of 1903 taken strictly, sales of the character there described, made without the required notice are absolutely forbidden, it is apparent, and especially from the fact that §4869 was left unchanged, that they were only intended to be voidable at the instance of creditors.

It does not seem to us, either from a consideration of the requirements themselves of the Act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause serious inconvenience to those affected by them as will amount to any unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the Act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction and not in the regular course of business, that its provisions are aimed. It is of course possible that an honest and solvent retail dealer might in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such *notice*. But "a possible application to extreme cases" is not the test of reasonableness of public
rules and regulations. Commonwealth *v.* Plaisted, 148 Mass.
44 375. "The essential quality of the police power as a governmental agency is that it imposes upon persons and property designed to promote the safety and welfare of the general public." Chicago, etc., R. Co. *v.* State, 47 Neb. 549-564.

Statutes imposing even more severe restrictions upon such sales than those of the Act before us, have been sustained in other jurisdictions in the cases cited in Walp *v.* Mooar, *supra*, of Squire & Co. *v.* Tellier, 185 Mass. 18, McDaniels *v.* Connelly Shoe Co., 30 Wash. 549, and Neas *v.* Borches, 109 Tenn. 398.

The fact that some of the goods replevied were placed in stock by

ıe defendant after his attempted purchase from Hendrick does not ıtitle the defendant to retain them. It appears that he merely re-laced goods sold with others purchased with the avails of such sales. There is no error.

In this opinion Baldwin, Prentice and Shumway, J's, concurred; Iamersley, J., dissented.

The foregoing is a true copy of the original opinion as filed with he reporter of the court; but the opinion is subject to alteration and ddition by the judges until printed in the official reports.

JAMES P. ANDREWS, *Reporter.*

Filed January 22, 1907.
JOHN C. AVERILL, *Clerk.*

15 JAMES M. YOUNG.
vs.
JOSEPH A. LEMIEUX.

HAMERSLEY, *J.* (dissenting):

Chapter 72 of the Public Acts of 1903, whose validity is challenged in this action, is in form an amendment of chapter 161 of the Public Acts of 1901 (Rev. 1902, 4868, 4869, 4870), but is in substance and legal effect a repeal of the Act of 1901 and the enactment of a new statute of a radically different character. The former Act required a sale of his stock in trade by a retail dealer to be made in writing and recorded within one day after the time of sale, under penalty of an unrecorded sale being void as against existing creditors of the vendor. The regulation as to what sales shall be made in writing and recorded is plainly a legislative power. The Act did not affect the property of the vendor nor restrict his freedom of action in his selling that property, and the penalty imposed for its disobedience, in view of the actual or constructive fraud against creditors possible to be more easily accomplished through such sale if not in writing and immediately recorded, was sufficiently appropriate to the legitimate purpose of the regulation to make its wisdom and justness a purely legislative and not a judicial question. We, therefore, held that the Act was not unconstitutional. Walp *v.* Mooar, 76 Conn. 515, 521. The Act of 1903, read in connection with its amendment by chapter 211 of the Public Acts of 1905, requires every retail dealer, before making a sale of his stock in trade, to come to an agreement with his vendee as to all the conditions of the sale; to state these conditions in writing, together with a description of the property to be sold and the parties to the sale; and
46 to cause this writing, signed by him, to be recorded at least seven days previous to making such sale, under penalty, in case of disobedience, of the sale being void as against existing creditors.

Do these limitations upon the owner's right to sell his property necessarily involve a substantial impairment of the value of that property? If they do, then the Act takes private property without

compensation, and it is immaterial under what form of words or pretense the result is accomplished. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority." Mugler *v.* Kansas, 123 U. S. 623, 661. The validity of the Act of 1903 turns upon the answer to this question. If the limitations upon sale involve no substantial impairment of the value of the owner's property, then the justification of the incidental annoyance to the owner may be regarded as a legislative rather than a judicial question; but if the necessary effect of the Act is destruction of private property without compensation, then the principles of the law applicable to such a case involve the invalidity of the Act. As to these principles there is little if any controversy. They are settled by our own decisions in accordance with the weight of authority in other jurisdictions. The protection of the citizen in the equal enjoyment of personal freedom and private property are secured by our Constitution in terms as broad as those which vest the legislative power in the general assembly. The power to destroy or substantially impair these rights is not included in the grant of legislative power,
47 and a law purporting to be the exercise of legislative power, whether of the power of taxation, or of trade regulation, or of protective legislation (often called police power), or of any other legislative power, is void if in effect it is a substantial impairment of those rights secured by the Constitution against the operation of every manifestation of legislative power. State *v.* Conlon, 65 Conn. 478, 489; State *v.* Travelers Ins. Co., 73 Conn. 255, 265; McKeon *v.* New York, N. H. & H. R. Co., 75 Conn. 343, 347; State *v.* McMahon, 76 Conn. 97, 102; State *v.* Feingold 77 Conn. 326, 331.

In State *v.* Travelers Ins. Co., we say: "The legislative power in all its manifestations is limited. If any exaction in the form of taxation is a seizure of the property of one for the benefit of another, or is an uncompensated confiscation of property, the law authorizing such exaction violates the Constitution and is void."

In McKeon *v.* New York, N. H. & H. R. Co., we say that a law authorizing acts which in effect constitute the taking of property without compensation is void, notwithstanding such acts are authorized in the exercise of the police power; that the phrase "police power" does not denote some transcendant form of legislative authority, but that the police powers of a State are simply the powers of government inherent in every sovereignty, and if exercised by legislation which violates any right guaranteed by the State Constitution they are to that extent invalid;" and that "the legislation on which the defendant relies in the case at bar makes no direct provision for compensation for property taken. The Constitution does; and that is enough."

48 In State *v.* McMahon, 76 Conn. 97, we say: Legislation is not exempt from constitutional guaranties because it relates to subjects commonly classed under the phrase "police power." The whole legislative power is committed to the general assembly sub-

ject to the constitutional restrictions and no manifestation of that power is exempt from these limitations. A law which takes private property without compensation is equally void as an exercise of educational power in building a schoolhouse, or of police power in the destruction of property dangerous to health. "Clothing infected with disease may be destroyed without compensation to its owner, not because the law authorizes it *is* a police regulation and so exempt from constitutional limitation, but because no right of property is invaded by such destruction." No law can authorize the taking of property without compensation, either for private or public use, because such legislation is outside the field of legislation included in the grant of legislative power of any nature. But the rights of property thus protected do not include a right to the possession or use of anything which is either in itself or a particular use inherently dangerous to others. The power to protect its citizens from such dangers is included in the grant of legislative power, and when anything which may be the subject of private ownership thus becomes dangerous, menacing the health, peace, or morals of the public, the legislature may authorize unlimited restrictions in its use, or even the destruction of the thing itself without compensation, and the law may be within the constitutional limits of this power of protective legislation, because the thing destroyed, when thus dangerous to the public, ceases to that extent to be the subject of ownership and its destruction is not the taking of property
49 but the destruction of a thing which no man has a right to own. The loose phrase "police power" is sometimes limited to this particular exercise of the power of protective legislation in respect to things which by reason of their danger to the public have to that extent ceased to be the lawful subject of private ownership; but more frequently its use covers as well the power of trade regulations and all regulations appropriate to promote public quiet, comfort and prosperity. Referring to such regulations we say, in State *v.* Reynolds, 77 Conn. 134: "Every citizen holds his rights subject to the exercise, within constitutional limits, of this power." Among the constitutional limits are those provisions which except from the grant of all legislative power the power to take property without compensation. The legislature has full power in promotion of general public interests to enact laws regulating the use of property which do not substantially affect the protected rights of property and person; it has the power to regulate the use of and even to destroy anything which may be the subject of ownership and which has become a menacing danger to the public; each kind of regulation is an exercise of that legislative power often called police power, but the principles by which the two kinds of regulation must be governed are very different.

In the former case the controlling question relates to the wisdom and justice of the regulation, and this is a legislative question; in the latter, the question is, has the protected right of property been lost by reason of the inherent danger to the public of the thing owned, and this is a judicial question. The distinction is vital. The efficacy of any limitation of legislative power in respect to property

rights protected by the Constitution, depends upon the con-
50 ception and maintenance of this distinction. Such limitation must inevitably become a mockery if the courts hesitate to determine in each case as a purely judicial question whether or not the protected right of property exists. In determining this judicial question the courts ordinarily follow the legislative finding as to the dangerous nature of the property, but not when they are satisfied that there exists no reason for such a finding. For instance, when the legislature finds that the liquor distilled from wheat is a menacing danger to public peace and morals which deprives the owner of any absolute right to sell such property and thereupon prohibits its sale, the courts accept the finding even if there may be room for some difference of opinion. But should the legislature find that wheat from which the dangerous liquor may be distilled is a menacing danger to public order and thereupon prohibit its sale, it will hardly be contended that the strongest desire to maintain the validity of a legislative Act could justify the court in accepting the finding and declaring the legislation valid. No more can it be seriously contended that the stock in trade of all retail dealers, whether used for sale in small quantities or in bulk, is in its nature such a menacing danger to the public that the owner has no right of property in such a dangerous use, so that a law destroying the stock in trade or substantially impairing its value does not appropriate property without compensation.

If, therefore, the restrictions of the Act of 1903 do substantially impair the value of the property affected there is no serious question as to its invalidity. Acts imposing somewhat similar restrictions and apparently intended to accomplish a similar pur-
51 pose were in the same year (1903), through a strange coincidence, enacted by the legislatures of a large number of States. The courts of New York, Ohio and Utah have held such legislation invalid. Wright *v.* Hart, 182 N. Y. 330; Miller *v.* Crawford, 70 Ohio St. 207; Block *v.* Schwatz, 27 Utah, 387. The courts of Massachusetts, Tennessee and Washington have supported their validity. Squire & Co. *v.* Tellier, 185 Mass. 18; Neas *v.* Borches, 109 Tenn. 398; McDaniels *v.* Connelly Shoe Co., 30 Wash. 549.

In this class of cases the primary question is, Does the law in its necessary practical effect appropriate property not dangerous to the public either inherently or in its particular use? This question determined, the application of the settled principles defining the limitation of legislative power is comparatively simple. As was said in State *v.* Feingold, *supra*, p. 333: "In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances." The Act of 1903 prohibits all retail dealers from selling their property which is palpably not dangerous to public safety either inherently or in its particular use without complying with certain antecedent requirements. Applying the rule of common sense to the commonly known conditions of trade, it seems to me that the necessary practical

effect of these requirements is a substantial impairment of the value of the property affected, and for this reason (without reference to the question whether the Act also violates that equality under the law in the enjoyment of civil rights which is guaranteed by our Constitution) I am unable to concur in the decision of the court.

52 The foregoing is a true copy of the original dissenting opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, *Reporter.*

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Supreme Court of the United States

OCTOBER TERM, 1907

Term No. 265 48 File No. 20,636

JOSEPH A. LEMIEUX
Plaintiff in Error

versus

JAMES M. YOUNG, Trustee
Defendant in Error

IN ERROR TO THE SUPREME COURT
OF CONNECTICUT

Brief of Plaintiff in Error

Plaintiff in Error,

CHARLES F. THAYER
JOHN J. PHELAN
His Attorneys

The Joyce & Sherwood Co., Printers, Stationers and Binders, 82 Cannon St., Bridgeport, Conn.

Supreme Court of the United States

OCTOBER TERM, 1907

Term No. 265 File No. 20,636

JOSEPH A. LEMIEUX
Plaintiff in Error

versus

JAMES M. YOUNG, TRUSTEE
Defendant in Error

IN ERROR TO THE SUPREME COURT OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT

The plaintiff in error purchased from Philip E. Hendrick on August 31, 1904, all the drug stock and fixtures in a drug store in Taftville, Connecticut, for $3,-

500.00. Thereafter on September 19, 1904, said Hendrick was adjudged a Bankrupt on the petition of his creditors and on January 5, 1905, the defendant, in error, as trustee of the bankrupt estate, replevied the stock and fixtures, so purchased, and contended in the Superior and Supreme Court of Errors of Connecticut on the trial of the replevin suit, that said purchase was void as against the creditors of said Hendrick, because of the failure of said Hendrick or the plaintiff in error, as shown in the trial court, to record a notice of intention to sell the property, as provided by Section 4868 of the General Statutes of Connecticut, as amended by Chapter 72 of the Public Acts of Connecticut of 1903.

The Amended section mentioned and in force at the time of the sale provides as follows: Sec. 4868:

> "No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction, and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the Town Clerk's Office in the Town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto."

Section 4869 of said Statutes penalizing such sales provides as follows:

> "All such sales, assignments, or deliveries of commodities which shall be made without the formalties required by the provisions of Sec. 4868 shall be void as against all persons who were creditors of the vendor at the time of such transaction."

Section 4868 of the General Statutes of Connecticut BEFORE its amendment by Chapter 72 of the Public Acts of 1903, as above, was as follows:

> "Whenever one who makes it his business to buy commodities and sell the same in small quantities for immediate consumption or for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, such sale or assignment shall be made in writing, describing the property so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, shall be acknowledged before competent authority, and recorded in one day after the time of such sale, assignment or delivery, in the Town Clerk's Office in the Town where the vendor has his place of business, but Sundays and legal holidays shall be excluded in the computation of such time."

The plaintiff in error contended and claimed in said Supreme Court, amongst other things, that said Chapter 72 of the Acts of Connecticut of 1903 amending Section 4868 of the General Statutes, as above, was unconstitutional and void because:

(*a*) It violates Section 1 of Article 14 of the Amendment to the Constitution of the United States by depriving the vendor and the plaintiff in error, the vendee of the drug stock in question, respectively, of their liberty, without due process of law, to wit, the liberty empowering them to contract for the purchase and sale of merchandise in bulk, of exercising the unrestricted right of engaging in lawful commerce in buying and selling; and in curtailing their rights in the transaction of legitimate trade and business.

(*b*) It violates said section by depriving the said vendor and vendee respectively, of property without due process of law, in that the vendor's right to sell, dispose and enjoy his property is impaired and diminished, and the vendee's right to acquire, use and enjoy property is taken away.

(*c*) It violates said section by denying to said vendor and vendee the equal protection of the laws of the State of Connecticut, and by abridging their respective rights, privileges and immunities as citizens of the United States.

The Supreme Court of Connecticut decided, upon the facts and claims herein stated, that said AMENDED statute (Sec. 4868) is not in violation of Sec. 1 of Article

14 of the United States Constitution and declared that the sale, of the drug stock, replevied by the defendant in error, was invalid, because of the failure of the vendor to record in the records of the town a notice of intention to sell it seven days before the sale as provided by the Amended Statute.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectively claims that said Supreme Court of Errors of Connecticut erred and mistook the law.

1st. By holding and deciding, contrary to the claim of the plaintiff in error, that the provisions of the Amended Statute requiring the spreading upon the Town records of a notice of intention to sell, seven days before the sale, and essential to the passing of title to the plaintiff in error by said Hendrick, WAS NOT IN VIOLATION of the Constitution of the United States as abridging and depriving the plaintiff in error of his liberty, or property or his contract rights in reference thereto, as by Section 1, Article 14 of the Amendments to said Constitution provided.

2nd. By holding and deciding contrary to the claim of the plaintiff in error, that the compulsory observance of the seven days' intention notice of said Amended Statute, imposed upon the plaintiff in error, as purchaser of said drug stock, was not a denial to the plaintiff in error,

of the equal protection of the laws of Connecticut or violative of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

ARGUMENT AND LAW CLAIMS.

By the terms of the Amended Statute and the decision of the Supreme Court of Errors of Connecticut, in support of it, the sale in a single transaction of a "large part" or the whole of the "stock in trade" of any retail dealer is VOID as against creditors, unless a notice of intention to make the sale, containing the names of the parties to it, a description of the property to be sold, and the conditions of sale be spread upon the records of the town in which the vendor does business "not less than seven days previous to such sale."

Under this Statute, it is unimportant whether the vendor at the sale was solvent or insolvent; whether he acted in good faith or not; whether his stock was small or large; whether the sale was open or secret; whether the proceeds were to be given to his creditors or not, a purchaser could not buy, an owner could not sell, until the latter's declared intention to sell, describing the property, and all the conditions of the sale was for seven days spread on the public records of the Town, where the seller did business.

Such legislation, we submit, unreasonably interferes with the right to buy and sell merchandise. It deprives the buyer and seller, even though they be of abundant means, of purchasing, selling or enjoying property.

The giving of seven days' notice of sale and the making public the conditions of sale, means in many instances, the driving away of such purchasers as do not wish the public, or their competitors to know where, when or how they obtain stock to do business, or of the terms of conditions of their purchase, or permit them to become conversant with their business methods or affairs, or of the monetary nature of the sale; and in addition such a notice not only hinders and obstructs the usually rapid handling and transfer of property, between the vendor and vendee, but contracts between them in reference thereto may be JEOPARDIZED OR DESTROYED during the notice period, by the delay occasioned in the scrutinizing of pretended claims, or disputed accounts presented against the vendor by unscrupulous creditors or competitors in business before the day of sale shown in such notice.

The Supreme Court of Errors of Connecticut, whilst upholding the constitutionality of the amended statute, admits that its enactment approaches the verge of legislative power. (See record, pages 20 to 25) It justifies its existence, however, on the ground laid down in Walp vs. Moar, 76 Conn. 515; and because the purpose of the act was intended for the public good and to "prevent fraud." It likened the purpose of the Amended Statute to the provisions of that which were held to be constitutional by the same Court in the case above named.

That the validity of the parent statute decided by the Court, in the case of Walp vs. Moar, supra, was quite different in character, purpose, operation, and

effect, from that before this Court, is convincingly set forth in the dissenting opinion of Judge Hammersley of the Supreme Court of Errors, in the case at bar, in part as follows: (See record, page 25.)

> "Chapter 72 of the Public Acts of 1903, whose validity is challenged in this action, is in form an amendment of chapter 161 of the Public Acts of 1901 (Rev. 1902, 4868, 4869, 4870), but is in substance and legal effect a repeal of the Act of 1901 and the enactment of a new statute of a RADICALLY DIFFERENT CHARACTER. The former Act required a sale of his stock in trade by a retail dealer to be made in writing and RECORDED WITHIN ONE DAY AFTER THE TIME OF THE SALE, under penalty of an unrecorded sale being void as against existing creditors of the vendor. The regulation as to what sales shall be made in writing and recorded is plainly a legislative power. The Act did not affect the property of the vendor nor restrict his freedom of action in his selling that property, and the penalty imposed for its disobedience, in view of the actual or constructive fraud against creditors possible to be more easily accomplished through such sale if not in writing and immediately recorded, was sufficiently appropriate to the legitimate purpose of the regulation to make its wisdom and justness a purely legislative and not a judicial question. We, therefore, held that the Act was not unconstitutional. Walp v. Moar, 76 Conn. 515, 521. The Act of 1903, read in connection with its amendment by chapter 211 of the Public Acts of 1905,

requires every retail dealer, before making a sale of his stock in trade, to come to an agreement with his vendee as to all the conditions of the sale; to state these conditions in writ-
46 ing, together with a description of the property to be sold and the parties to the sale; and to cause this writing, signed by him, to be recorded at least seven days previous to making such sale, under penalty, in case of disobedience of the sale being void as against existing creditors.

"Do these limitations upon the owner's right to sell his property necessarily involve a substantial impairment of the value of that property? If they do, then the Act takes private property without compensation, and it is immaterial under what form of words or pretense the result is accomplished. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under solemn duty—to look at the substance of things whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority." Mugler v. Kansas, 123 U. S. 623, 661. The validity of the Act of 1903 turns upon the answer to this question. If the limitations upon sale involve no substantial impairment of the owner's property, then the justification of the incidental annoyance to the owner may be regarded as a legislative rather than a judicial question; but if the necessary effect of the Act is destruction of private property without compensation, then the principles

of the law applicable to such a case involve the invalidity of the Act. As to these principles there is little if any controversy. They are settled by our own decisions in accordance with the weight of authority in other jurisdictions. The protection of the citizen in the equal enjoyment of personal freedom and private property are secured by our Constitution in terms as broad as those which vest the legislative power in the general assembly. The power to destroy or substantially impair these rights is not in-
47 cluded in the grant of legislative power, and a law purporting to be the exercise of legislative power, whether of the power of taxation, or of trade regulation, or of protective legislation (often called police power), or of any other legislative power, is void if in effect it is a substantial impairment of these rights secured by the Constitution against the operation of every manifestation of legislation power. State v. Conlon, 65 Conn. 478, 489; State v. Travelers Ins. Co., 73 Conn. 255, 265; McKeon v. New York, N. H. & H. R.R. Co., 75 Conn. 343, 347; State v. McMahon, 76 Conn. 97, 102; State v. Feingold, 77 Conn. 326, 331."

Again on page 27 of the record, Judge Hammersley in discussing and defining the police power of the State, made by the Court the basis of its decision says:

"Every citizen holds his rights subject to the exercise, within constitutional limits, of this

power." Among the constitutional limits are those provisions which except from the grant of all legislative power the power to take property without compensation. The legislature has full power in promotion of general public interests to enact laws regulating the use of property which do not substantially affect the protected rights of property and person; it has the power to regulate the use of and even to destroy anything which may be the subject of ownership and which has become a menacing danger to the public; each kind of regulation is an exercise of legislative power often called police power, but the principles by which the two kinds of regulation must be governed are very different.

In the former case the controlling question relates to the wisdom and justice of the regulation, and this is a legislative question; in the latter, the question is, has the protected right of property been lost by reason of the inherent danger to the public of the thing owned, and this is a judicial question. The distinction is vital. The efficacy of any limitation of legislative power in respect to property rights protected by the Constitution, depends upon the conception and maintenance of this distinction. Such limitation must inevitably become a mockery if the courts hesitate to determine in each case, as a purely judicial question, whether or not the protected right of property exists. In determinating this judicial question the courts ordinarily follow the legislative finding as to the dangerous nature of the property, but not when

they are satisfied that there exists no reason for such a finding. For instance, when the legislature finds that the liquor distilled from wheat is a menacing danger to public peace and morals which deprives the owner of any absolute right to sell such property and thereupon prohibits its sale, the courts accept the finding even if there may be room for some difference of opinion. But should the legislature find that wheat from which the dangerous liquor may be distilled is a menacing danger to public order and thereupon prohibit its sale, it will hardly be contended that the strongest desire to maintain the validity of a legislative Act could justify the court in accepting the finding and declaring the legislation valid. No more can it be seriously contended that the stock in trade of all retail dealers, whether used for sale in small quantities or in bulk, is in its nature such a menacing danger to the public that the owner has no right of property in such a dangerous use, so that a law destroying the stock in trade or substantially impairing its value does not appropriate property without compensation "

Judge Hammersley further applying the facts of this case to the established definitions of Police Power, concludes as follows:

"If, therefore, the restrictions of the Act of 1903 do substantially impair the value of the property affected there is no serious question as to its invalidity."

"In this class of cases the primary question is, does the law in its necessary practical effect appropriate property not dangerous to the public either inherently or in its particular use? This question determined, the application of the settled principles defining the limitation of legislative power is comparatively simple. As was said in State v. Feingold, supra, p. 333: "In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances." The Act of 1903 prohibits all retail dealers from selling their property which is palpably not dangerous to public safety either inherently or in its particular use without complying with certain antecedent requirements. Applying the rule of common sense to the commonly known conditions of trade, it seems to me that the necessary practical effect of these requirements is a substantial impairment of the value of the property affected, and for this reason (without reference to the question whether the Act also violates that equality under the law in an enjoyment of civil rights which is guaranteed by our Constitution) I am unable to concur in the decision of the court."

The plaintiff in error insists the Amended Statute interferes not only with the liberty and property of the vendor, as stated, but that its provisions are inexcusably

oppressive upon him, the vendee, insomuch as the alleged protection of the vendor's creditors may, in a measure, appear publicly worthy, whilst in his case there appears no sufficient excuse or good reason for imposing a purchase prohibition that interferes and hinders him from trading with and lawfully acquiring from a retail dealer, property he could unrestrictedly acquire from any other person than a retail dealer.

In the case of Jacobs, 98 New York, Judge Earl said:

"So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right not only of freedom from actual service, imprisonment on restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation."

In People v. Marx, 99 N. Y., 377, Judge Rapallo said:

"The term 'liberty' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but it is deemed to embrace the right of man to be free in the enjoy-

ment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

As to what is an interference with the right of property has likewise been well defined by Judge Earle, in the matter of Jacobs, 98 N. Y., 98, and his language has been repeatedly quoted and applied throughout this country:

"This constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for private or public use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value or takes away any of its essential attributes, deprives the owner of his property.

"The constitutional guaranty would be of little worth if the Legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house or to work at any lawful trade therein. If the Legislature has the power

under the constitution to prohibit the prosecution of one lawful trade in a tenement house, then it may prevent the prosecution of all trades therein. 'Questions of power,' says Chief Justice Marshall, in Brown v. State of Maryland, 12 Wheat, 419, 'do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.' Blackstone, in his classification of fundamental rights, says: 'The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land' (1 Com.; 138). In Pumpelley v. Green Bay Co. (13 Wall., 166), Miller, J., says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.' In Wyneham v. People (13, N. Y., 378, 398), Comstock, J., says: 'When law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power.' In People v. Otis (90 N. Y., 48), Andrews J., says: 'Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

In people v. Gillson, 109 N. Y., 389, a law was de-

cared to be unconstitutional, which prohibited the sale or disposition of any article of food, or any offer or attempt to dispose of such article, upon any representation or inducement that the purchaser would receive a gift, prize, premium or award in connection with such purchase. Judge Peckham said:

> "It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competion, and therefore flying to the Legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields. By the provisions of this Act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed by such legislation."

In State v. Goodwill, 33 W. Va., 179, 6 L. R. A. 621, it was said:

> "The right to use, buy and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution. If the Legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts."

By the provisions of said Amended Statute, the owner and purchaser are forbidden to make a contract for merchandise in the manner deemed proper by every jurisdiction for ages past and until a few years ago. It affixes a condition upon the ownership of such property that deprives it of one of the important attributes of property. A man may not sell or buy it without publishing to the world for seven days a description of it, the parties, and every condition of sale and purchase, then follows a period of inaction of seven days, during which the property, the owner and purchaser are, as to that transaction, lost to view in the commercial world. It appears to us in this connection, to be improper that the purchaser should be punished, by denying him of the right to contract and of the fruits of contract, because of the possibility of his vendor being indebted at the time of sale. It appears insufficient to say the purchaser will acquire good title without the statutory notice being given, if there be no creditors of the vendor at the date of sale, because the vendee has no knowledge, or has he any means of knowing whether there are creditors, until upon the expiration of the notice period, no creditors appear. If this statute

is lawful, is there any reason why its principles cannot be extended to other classes of persons and contracts by subsequent legislatures and cause every PURCHASER to obtain or await the consent of his vendor's CREDITORS to the transfer of every kind of property? What reason is it that prompts such an unusual departure from methods of contract heretofore sanctioned by experience, other than that the arbitrary designation of retailers as commercially unworthy, must be somehow justified in law in the interest of the wholesaler, and that such a statutory device in aid of wholesale dealers, as a class, in the collection of accounts from their customers is a public necessity. That such reasoning, however, is not legally justified is shown by the language used in Lawton vs, Steel, 152, U. S. 133, 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts."

In Colon v. Lisk, 153 N. Y., 188, Judge Martin said:

"Under the mere guise of a Statute to protect against wrong, the Legislature cannot arbitrarily strike down private rights and invade personal freedom, or confiscate private property. The police power must be exercised within its appropriate sphere, and by appropriate methods. (People v. Arensberg, 103 N. Y., 399.)

This power can be exercised only to promote the public good and is always subject to judicial scrutiny (Foster v. Scott, 136 N. Y., 577, 584). Whenever the Legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizen's rights. (People ex. rel. Nechamous v. Warden, 144 N. Y., 529, 535.) That power must be exercised subject to the provisions of both the Federal and State constitutions. Laws passed in the exercise of it must tend toward the preservation of the lives, health, morals or welfare of the community, and the Court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner toward accomplishment of the objects for which the Legislature may use this power (Health Department v. Rector, 145 N. Y., 32, 39).

"The question here to be determined is whether the enactment of the statute we are considering was a proper exercise of the police

power. When we submit this statute to the test of the principles established by the case already cited, to which others might be added, it becomes obvious that it cannot be upheld upon the ground that it is within the police power of the State."

"It is to be observed that the statute does not relate to the health, morals, safety or welfare of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish that purpose. But, on the contrary, they are plainly oppressive and amount to an unauthorized confiscation of private property for the mere protection of private rights. It is in no manner attempted by this statute to protect any public interest, or defend any public right. Nor is it calculated to accomplish that end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights and private property."

In view of the foregoing decisions, and the dissenting opinion of Judge Hammersley, supra, as appears by the record page 25, it does not appear that said Amended Statute is justified as a police regulation. This statute does not assume to be a remedy against fraudulent transfers of property, or occasion inquiry as to whether the vendor or vendee were actuated by good or bad motives. Under its provisions the bona fides of the parties or their

solvency is not regarded, the innocent and the wicked suffer equally. A statute such as this may possibly be justified in point of morals as a police regulation, if it be true that ALL sales of merchandise in bulk by retailers are probably fraudulent, and that the parties to such sales ORDINARILY intend to cheat their creditors. In this regard we know, however, of common knowledge, that only in a small percentage of such sales does actual fraud exist. It is as unnecessary, therefore, as it is unjust, to put the seal of suspicion and condemnation on transfers of property that are in their essentials not probably or necessarily fraudulent. No legislative enactment can impute a crime under the guise of police power to any person whilst pursuing the exercise of a constitutional right.

Tynoler vs. Warden, 157 New York, 116.
State vs. Julow, 129 Mo., 163.
Commonwealth vs. Perry, 155 Mass., 117.
Godcharles vs. Wigeman, 113 Pa., st. 431.
State vs. Goodwill, 33 W. Va., 179.
Ramsey vs. People, 142 Ill., 380.
State vs. Missour Tie Co., 65 L. R. A., 588.
Ritchie vs. People, 155 Ill., 98.
People ex. rel. Rodgers vs. Coler, 166 N. Y., 1.
State vs. Dalton, (R. I.) 48 L. R. A., 775.
People ex. rel. Cossey vs. Grout, 179 N. Y., 417.

We beg to call the attention of the Court, in addition to the above, to a class of cases which appear to involve the precise principles upon which our statute is based.

In Block v. Schwartz (76 Pac. Rep., 22, 65 L. R. A.

308,) decided by the Supreme Court of Utah on March 24, 1904, it was held, that a statute prohibiting, under penalty, a merchant from disposing of his stock of goods in bulk, without notifying his creditors, was a violation of federal constitutional safeguards, and not justified by the police power.

After carefully annalyzing the act, and citing the various definitions of liberty, Mr. Justice Bartch said:

> "Property has some essential attribute without which we could not conceive it to be property. Among these are use, enjoyment, susceptibility of purchase, sale, and of contracts in relation thereto. The taking away of any one of the essential attributes may violate the constitutional guaranty that no person shall be deprived of his property without due process of law as clearly as in case of a physical taking without due process of law. An enactment, therefore, like the one in controversy, which deprives an owner of his liberty to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business might lawfully do, invades his rights guaranteed by the Constitution, and cannot be upheld; and to prevent the free exchange and sale or disposal of property according to the IMMEMORIAL USAGES OF TRADE is to deprive it of one of its main attributes. 'The third absolute right inherent in every Englishman,' says Sir William Blackstone in his classification of fundamental rights, 'is that of property, which consists in the free

use, enjoyment, and disposal of all his acquisitions, without any control or diminition, save only by the laws of the land.' (1 Bl. Com. 138). The rights thus referred to and defined by the illustrious commentor is absolute and inherent in every American subject of the United States, by virtue of the supreme law of the land. Therefore, 'when a law annihilates the value of property, and strips it of its attributes, by which it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power."

(Wynehammer v. People, 13 N. Y., 378, 308.)

The opinion then proceeds to discuss the case with relation to the police power, and the various grounds on which that power can be called into operation, and continues:

"The enactment in controversy does not appear to have reference to either of the objects here indicated. It can hardly be said that a law which prevents a person though indebted, who is abundantly able to pay his debts, from selling his property in the same way his neighbors do, and in accordance with the time honored custom or usage, either promotes the safety, health, comfort or welfare of the community or the

State. If the act referred generally to insolvent debtors, it would present a different question; but it relates simply to debtors and purchasers of debtors of a particular and specified business, whether solvent or insolvent; so that the merchant who is worth a fortune over and above his indebtedness, and who is able to respond instantly to his creditors, who may be only such because of convenience in trade and business transactions, nevertheless finds himself, under the provisions of the act, deprived of the liberty to sell his goods or to contract in relation thereto in the same manner that others engaged in the same business may lawfully do. Not only this, but by making a sale which would be perfectly lawful if made by his neighbor both he and his purchaser become criminals, and amendable to the penalty provided in the act.

In the case of Wright vs. Hart, 182 New York 330, decided in October, 1905, the Court through Judge Werner says, in part, in relation to the validity of a statute regulating the sales of merchandise in bulk, as follows:

"In the case at bar we are concerned with no quibbles of verbiage or technicalities of construction, but with the broad question whether an act of our Legislature is repugnant to the 'Iron rule' of our Federal and State constitutions, that no citizen shall be deprived of 'life, liberty and property,' or be denied the 'equal

protection of the laws.' Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts.

People vs. Marx, 99 New York, 377.
State vs. Loomis, 115 Mo., 307.
Allgeyer vs. Louisiana, 165 U. S., 578.

"The right to use, buy and sell property is protected by the Constitution, and 'when a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power.

Wynehammer vs. People, 13 New York, 378, 398.

"Let us now analyze the statute under scrutiny. Every sale of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall, at least five days before the sale make a full and detailed inventory, showing the quantity, and so far as possible, with the exercise of reasonable dilligence the cost price to the seller of each article to be

included in the sale, and unless such purchase shall at least five days before the sale, in good faith make full, explicit inquiry of the seller as to the name and place of residence or place of business of each and every creditor of the seller, and the amount owing to each creditor, and unless the purchaser shall in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with reasonable diligence acquire knowledge of such proposed sale, and of the stated cost price of merchandise to be sold, and of the price to be paid therefor by the purchaser. The seller shall at least five days before such sale file a truthful answer in writing of each and all of said inquiries. No one will have the temerity to suggest that this drastic and cumbersome statute is not in restraint of the rights of 'liberty' and 'property' as those terms have been judicially declared to have been used in the Federal and State Constitutions. The rights of 'liberty' and 'property' as we have seen, are sacred and substantial rights guaranteed by the Federal and State Constitutions.

"Any law that INTERFERES WITH THE RIGHT TO MAKE and enforce CONTRACTS affects BOTH THE LIBERTY AND PROPERTY of the citizen. The right to sell and purchase merchandise in bulk is no less under the protection of the Constitution than the right to sell and buy in the SMALLEST POSSIBLE QUANTITIES. Any legislative interference with either of these rights, that is clearly forbidden as the other, can only be justified on

the ground of public necessity, which is but another way of saying it is for the general welfare; such interference should not only be based upon public necessity, but it should be conservative, reasonable and well adapted to the end to be attained.

"Until the 11th of April, 1902, it was just as lawful in this state to sell any portion of a stock of merchandise, or the whole of such stock in bulk, as to sell the same goods piece by piece at retail. By the statute, which went into operation on that day, the sale of any stock of merchandise in bulk, or of any considerable portion thereof, was made unlawful as against the creditors of the seller, unless both the seller and purchaser should do many things that were clearly and substantially restrictive of the right of contract as it had heretofore been enjoyed in respect to such property. This criticism of the statute is sought to be answered by the plea that the law was designed to correct a great public evil, that it was aimed at a class of merchants who have engaged in the fraudulent practice of obtaining merchandise on credit for the purpose of making hasty and secret sales thereof in bulk, then decamping with, or otherwise disposing of the proceeds at the expense of their creditors. It may be conceded that this was the ostensible purpose of the statute, and that the evil complained of was one of substantial reality and magnitude, for which an efficacious remedy was much to be desired. But that does not meet the argument against the constitutionality of the

statute. The question still remains whether the legislature has not overstepped the limits of its power by practically putting an embargo upon all sales of merchandise in bulk under the guise of a statute ostensibly designed to prevent frauds in such sales. Beginning with the title of the statute, we observe that its object is 'to regulate the sales of merchandise in bulk.' If we give the term 'merchandise' its ordinary business signification, there is no escape from the conclusion that the statute applies to merchants alone as distinguished from manufacturers, farmers, bankers, the members of the several professions, mechanics, etc.

"Under this construction of the law the merchant is prohibited from doing that which is permitted to all other men. Merchants comprise a comparatively small number of the community at large, and therefore this would seem to be class legislation which denies to those affected by it the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution. If the term 'merchandise' is given a somewhat more liberal interpretation, so as to include finished manufactured products and the stock of jobbers and wholesale merchants, it is open to the criticism that it denies the equal protection of the laws to all citizens, because it imposes on certain classes, such as manufacturers, jobbers, and wholesale merchants, burdens that are destructive of their legitimate business. "The statute as we have seen, discriminates between sales of entire stock in bulk, and sales of por-

tions of said stocks. It does not differentiate between sales that are honestly made and sales that are made with intent to defraud. The sale of an entire stock is declared to be fraudulent and void as against the seller's creditors, no matter how solvent he may be, unless all the harassing details of the statute are observed. Let us again emphasize the assertion that we do not question the power of the legislature to enact reasonable laws for the protection of creditors and the prevention of fraud. That this right falls within the general scope of the police power, no one will deny. But the police power only begins where the constitution ends. Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarcation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the constitution has been trespassed on, and when the exercise of the police power clearly infringes upon vested constitutional rights, Courts should not concern themselves with the probable purposes for which it is exercised, or the evil it was designed to correct.

"First: the Constitution, then the police power.

"The statute under consideration sweeps away the constitutional rights of 'liberty' and 'property' of a limited class of our citizens, who are entitled to the protection of the laws with al

other citizens. It invades the right of liberty, because it arbitrarily and unnecessarily denies the right of a specified class of citizens to contract for, bargain and sell a particular kind of property. It violates the constitution in prohibiting all sales of merchandise in bulk, whether honest or dishonest, except upon conditions that are harsh, drastic, unreasonable, and unnecessary, in so far as they do not tend to effectuate the objects for which such a statute may properly be enacted. It ignores the constitutional guaranty relating to property rights because it so RESTRICTS THE RIGHT OF CONTRACT as to deprive property OF ITS CHARACTERISTICS as such." "If the statute affected none but insolvent sellers, or related merely to debts due, or gave to purchase price creditors an equitable lien for the respective shares of the proceeds of a proposed sale, or if, instead of interdicting in ADVANCE a sale in bulk, it had made some reasonable provision for impounding the proceeds of sale until the seller's obligations could be judicially determined, there might be some force in the suggestion." "It is said that similar statutes, some of them much more drastic, have been adopted in twenty states or jurisdictions. Twenty wrongs can never make one right. There is, however, a singular, not to say suspicious coincidence in the time and substance of all this legislation. We are indebted to our Brother Bartlet for the suggestion that half of these statutes were enacted in 1903 and 1904, and nearly all of them since 1900. Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while

much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes. This statute "is evidently of that kind which is meant to protect some class in the community against the fair, free and full completion of some other class, the members of the former class thinking it impossible to hold their own against such competition and, therefore, flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors."

The Court further said that where such statutes were "upheld as in Mass., Conn., Tenn. and Washington they were far less drastic than our own, in that they either except from their operations all sales by executors, etc., etc., or provides that sales of merchandise in bulk shall only be PRESUMPTIVELY void, if the statutory requirements are not observed; or as in Connecticut, that one day AFTER THE SALE there shall be filed a descriptive writing duly signed and acknowledged."

In Neas v. Borches, 109 Tenn., 398; s. c., 71 S. W. Rep., 50, although the Supreme Court of Tennessee, by a divided Court, sustained legislation in reference to sales of merchandise in bulk, the dissenting opinion of Mr. Justice Wilkes is clearly more satisfactory than the bare conclusions announced by the majority of the Court. He says:

"It is observed that this act embraces all sales of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, no matter whether the seller be solvent or insolvent, and no matter whether done in actual good faith or fraudulent purpose; and unless notice is given to all the creditors of the seller, the sale will be presumed to be fraudulent and held to be void. The practical effect is to compel every merchant, whether solvent or insolvent, to obtain the consent of all his creditors before he can close out his business for any purpose or any price. This, it is evident, must cause in some cases, great oppression, and in every case will hamper and hinder the merchant in the disposition of his property. The effect of this act is not to take away the merchant's property, it is true, but it is to restrict and burden it in such a manner as to prevent its free transfer and the realization of its full value. It takes away one element of its value, to wit: the right to use and legitimately dispose of it. As is said in Third National Bank v. Divine Grocery Co., 97 Tenn., 611: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate manner, is as much depriving him of his property as if the property itself was taken.' The object and purpose of the act is, no doubt, to prevent fraudulent sales of an insolvent merchant's property, or such sales, when designed to give preference to one or more creditors; but the act is not confined to such cases, either in its caption or body. While the equal or equitable distribu-

> tion of a failing debtor's property, and especially that of a failing merchant, may be a laudable purpose, and one which the general assembly has by more than one act endeavored to secure, still it cannot be done at the expense of a violation of the fundamental law of the land."

Various cases may be cited in opposition to these authorities, but on an examination it will be found that they are either based on statutes different in their effect, else that the constitutional question was not raised, or that the constitutional provisions which were considered were different from those on which we rely, or that the cases were not well considered.

In McDaniels v. Connolly Shoe Co., 30 Wash., 549; 60 L. R. A., 947, a statute made it the duty of

> "Every person who shall bargain for or purchase any stock of goods in bulk, for cash or on credit, before paying the vendor any part of the purchase price thereof, to demand of and receive from him a written statement showing the names and addresses of all his creditors, together with the amount of such indebtedness, whether due or to become due, 'verified according to a form set out in the statute and made fraudulent and void any sale of such stock of goods in bulk unless the vendee demanded and received from the vendor such statement,' 'and without paying or seeing to it that the purchase money of said

> property is applied to the payment of the bona fide claims of creditors of the vendors as shown upon such verified statement, share and share alike.' "

It will be seen, that this act did not PREVENT the vendor and vendee from CONTRACTING when they saw fit to do so. It merely provided that when THE SALE WAS MADE, the purchase money was to be applied, pro rata, to the several creditors whose names and addresses were supplied by the vendor.

So, in John P. Squire & Co. v. Tellier, 69 N. E., Rep., 312, a statute contained a clause, exempting from its provisions, sales by executors, administrators, receivers, assignees, for the benefit of creditors, trustees in bankruptcy, and public officers acting under judicial process. Chief Judge Knowlton said:

> "The Legislature undoubtedly assumed to act under what is termed broadly the police power, and more specifically to act under the authority directly conferred by Part 2, C. 1, Section 1, Art. 4, of the Constitution of Massachusetts, which permits them to 'make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances as they shall judge to be for the good and welfare of this commonwealth.' "

It will be noted that we have no corresponding provision in the Constitution of Connecticut, and that in the case cited, no attack was made upon the statute, as being violative of the Federal Constitution.

The above opinion of Squire vs. Tellier, refers to Hart v. Roney, 93 Md., 432, and Fisher v. Herrman, 95 N. W. Rep., 392; but it will be seen that the Courts of Maryand and Wisconsin were not called upon to pass upon the constitutionality at the legislation there under consideration, but merely to CONSTRUE it. Hence they are not authority in the case at bar.

Furthermore, it will be seen, that in the statutes of Maryland and Wisconsin, it was provided that the sale would be PRESUMED to be fraudulent and void, unless, etc. Here the statute absolutely declared the sale to be fraudulent and void.

In the case of Williams vs. Fourth Nat. Bank, 15 Oklahoma, 477, the Court held that the sales of bulk statute of the Territory, under the provisions of which all sales in bulk were to be "presumed" to be fraudulent and void as to creditors, unless certain requirements set forth in it were observed, was not in contravention of the organic law of the Territory. It will be noted, however, that that statute, unlike the statute before this Court, merely "presumed" the sale to be invalid between the parties, unless certain formalities were observed, and that claim was made or question raised as to the statute being violative of the Federal Constitution, but only that it contravened the organic law of the Territory. It is seen, therefore, that that case, similar to those of Maryland and Wisconsin above, can but be of value as an authority for the case at bar.

The defendant in error may cite Walp v. Lamkin & Faster, 76 Conn., 515, supra, in support of his position,

but in that case it will be seen that the statute before the court was the parent of the amended statute, now before the court for determination, that statute provided:

> "whenever one who makes it his business to buy commodities and sells the same in small quantities for immediate consumption for the purpose of making a profit, shall, at a single transaction, and not in the regular course of business, sell, assign or deliver the whole or a large part of his stock in trade, such sale, assignment or delivery shall be made in writing, describing the property so sold, assigned or delivered, and all conditions of such sale, assignment or delivery shall be acknowledged before some competent authority authorized to take acknowledgments of deeds, and recorded within one day after the time of such sale, assignment or delivery in the town clerk's office in the town where the vendor has his place of business; but Sundays and legal holidays shall be excluded in the computation such time."

By a subsequent section, it was provided in said statute: quoted supra

> "All such sales, assignments or deliveries of commodities which shall be made without the formalities required hy the provisions of Section 4861, shall be void as against all persons who were creditors of the vendor at the time of such transaction."

By this statute, as will be seen there was no restriction on the RIGHT TO BUY AND SELL. It was merely required that when a CONTRACT of SALE WAS ENTERED INTO, it should be in writing, and should be recorded in the town clerk's office, within one day AFTER the COMPLETION OF THE SALE.

Such regulations as above are not subject to the criticisms which are applicable to the amended statute of Connecticut which we are proceeding against. It will be noted that whilst the statutes proceeded against in Utah, Ohio and New York, and held unconstitutional, contain a greater number of inconvenient provisions than our Connecticut statute as to the matters of personal notice, to creditor's inventory, cost of merchandise, etc., etc.: the effect of such statutes, however, upon the vendor or vendee to a contract is less demoralizing than the effect of the FEWER provisions of our own amended statute. It will be seen that the provisions of the former apply and are made to concern ONLY THE PARTIES TO THE CONTRACT AND THE CREDITORS OF THE VENDOR IN A PRIVATE AND PERSONAL WAY, and without exposure to any one, except those pecuniarily interested, whilst under our statute, the same results are accomplished between parties and creditors, but in a far more objectionable way through the giving notice of intended sales of specified property and all conditions thereof, in the PUBLIC RECORDS OF THE TOWN for the period of seven days. If it be true that evil business consequences follow the giving of private notice for five days to creditors before sale in the jurisdictions cited, how much more harmful in a business way must be the consequences of a seven days' Notice of Intention, when not only given to creditors, but to the whole world by the publication of such notice in the pub-

lic records? Will not business evils be multiplied by such a course? Will not the attributes of property be demoralized and the liberty and power of contracting parties be shattered from being exposed, in the interest of business rivals or others, to the presentation of doubtful or bogus claims by any one who may choose to upset the sale, or who by more favorable offers of purchase, hamper or hinder the contracting parties from carrying out their contract?

THE AMENDED STATUTE VIOLATES SECTION 1, OF ARTICLE XIV, OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE IT DENIES TO THE PLAINTIFF IN ERROR AS THE VENDEE OF SAID HENDRICK, AND TO PERSONS PLACED in a position similar to that of the plaintiff in error, the equal protection of the Laws of Connecticut, and abridges their respective privileges and immunities as citizens of the United States.

The meaning of this constitutional provision has been clearly defined in a large number of cases, out of the multitude of which a few of the more familiar ones, and which are most applicable to the present case follows:

In Barbier v. Connolly 113 U. S., 27, 31, it was said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws', undoubtedly

intended that not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the SAME PURSUITS BY OTHERS UNDER LIKE CIRCUMSTANCES; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

In Ruhstrat vs. People 185 Ill. 183, in which was questioned the validity of a statute denying the use of the flag for advertising purposes, Judge Magruder said:

"The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act of persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so, not merely

for the public benefit, but for the promotion of his own interests. By thus excluding artists or exhibitors from the inhibitions of Sec. 1 of the Act, the Act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the Courts of this country. The Legislature has clearly no power to deny the plaintiff in error the right to the national flag to advertise his business, or, in other words, to deny all persons following particular occupations the right to use the national flag, and, at the same time permit artists or exhibitors of art to use the same. The manner in which the act thus discriminates in favor of one class of occupations and against all others, places it in opposition to the constitutional guarantee hereinbefore referred to."

To the same effect are the following cases:

In Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U. S., 150, 159.

Cotting vs. Kansas City Stockyards Co., 183 U. S., 79.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.

Matter of Pell, 171 New York, 48.

McPike vs. Van DeCarr, 178 New York, 425.

Ballard vs. Mississippi River Bill Co., 81 Miss., 507.

We have, however, more direct authority on the point before the Court, since in the cases cited, in support of other phases of our contention, it is held that such statutes violate this provision of the Federal Constitution.

In Block v. Schwartz (supra) Mr. Justice Bartch said:

> "Looking again at the provision of the enactment, it will be observed that it aims at but one kind of business—the mercantile—and impliedly and arbitrarily divides those engaged therein into two classes. The merchants of the one class, being unaffected in their property rights, may make sales and contracts in relation thereto as they see fit; while the same kind of sales and contracts, if made in the same manner by the merchants of the other class, are not only declared void, but will render both the sellers and purchasers liable to criminal prosecution. The enactment, as we have seen, not only places the debtor class in the mercantile business at a great disadvantage in competing with others in the same line of business, but its provisions are exceedingly strict and oppressive. Nor do its provisions apply generally to all debtors within the commonwealth. They apply only to merchants, who are debtors, while farmers, miners, manufacturers, traders, and other dealers, though debtors, may sell and dispose of their property when and as they please so long as act in good faith. If the act is designed to prevent fraud, why not make it general? Looking alone at the

debtor class, there appears to be such a discrimination as is difficult to reconcile with justice and fair dealing. Nor do we perceive any justification for restraining a merchant who is in debt, but solvent, from selling his merchandise, in whole or in part, as he may deem most advantageous, in order to prevent one who is insolvent from exercising the same privilege."

In Miller vs. Crawford, 70 Ohio St. 207, Judge Schauck said:

"By the act the legislature has attempted to discriminate unwarrantably among debtors and creditors. It does in terms apply to sales in bulk by wholesale as well as retail dealers in merchandise. "Although the act applies to all creditors of the seller, it applies to those only who are creditors of the owner of a stock of merchandise, and thus an unreasonable burden is imposed upon a limited class of debtors for the supposed benefit of a limited class who are their creditors. The fact that within six years the legislature of twenty states have passed acts upon this subject is urged by counsel for the plaintiff as indicative of unusual and increasing frauds in sales of this character. If enquiry into the genesis of this legislation were practicable, it might show that it has resulted from the activity of a class of creditors to secure advantages not offered by law to creditors generally because

not thought to be consistent with public interests. "The present act, considering that the benefitted creditors are chiefly those from whom the seller has purchased, in effect creates a vendor's lien upon a limited class of chattels without any public reason for the discrimination."

In the dissenting opinion in Neas v. Borches (supra) Mr. Justice Wilkes said:

"No good reason can be given why merchants should be trammeled and restricted in the sale of their goods, when farmers, traders, manufacturers, and other dealers have the unrestricted right to sell when they please, provided it is done in good faith. Nor is there any good reason why such a sale should, in the case of a merchant, be presumed to be fraudulent, when in the case of other dealers the presumption is in favor of good faith, and proof is required to show fraud. Nor is there any good reason to restrict the merchant who is solvent from making sale of his goods, as he may deem advisable, in order to prevent the insolvent merchant from exercising the same option and privilege. The sale of merchandise is no more affected by a public use that is the sale of farm products, or manufactured articles, or live stock, or the dealers in any commodity."

In State v. Julow (supra) Mr. Justice Sherwood said:

> "But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class—to all workingmen, etc.,—but only to those who belong to some 'lawful organization, or society', evidently referring to a trade union, labor union, etc. Where a statute does this—where it does not relate to persons or things of a class—it is a special, as contradistinguished from a general law. Here a non-trade-union man or a non-labor man would be discharged without ceremony without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade-union or labor-union man, he could not be discharged if such discharge rested on the ground of his being a member of such organization. In other words, the Legislature have undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class and, therefore, the statute which does this is a special not a general law, and therefore violates of the constitution."

No one will doubt that the unfavorable criticisms of the Courts contained in the cases cited, applying as they do to statutes in which the mantel of privacy is made to cover the DOINGS OF THE CONTRACTING PARTIES as well as the creditors of the vendor, would be much accentuated if the provisions of our Connecticut statute was the subject of their determination.

Our Connecticut statute discriminates against, interferes with, and prohibits the retail merchant ONLY, of all other traders and merchants in the State, who are interested in purchase and sale of merchandise. It hinders him and his would-be vendee from making a contract for its sale, unless they comply with conditions and forms not expected or exacted from anybody else. The retail vendor ONLY cannot sell his goods whether he be honest or not, indebted or not, in the whole or great part, or his vendee regardless of his worth or standing, acquire them, without publishing for SEVEN DAYS TO THE WORLD what is to be sold, and the conditions of sale, showing whether it be for cash or upon credit, or partially so, and the nature, quantity and value of the security offered by the vendee for the purchase. The effect of such an exposure of business affairs, with its humiliating conditions, is a hindering and hampering of the retail vender, who is solvent and honest, who may desire to merely substitute one branch or the whole of his business by another, and is a singling out and branding of retail merchants, that is as unnecessary as it is unjust. The vendee, for no public reason affecting him, is in like manner, and without fault on his part, kept in helpless suspense during the seven day period of statutory business inaction. Whether his means be great or small, he cannot under the statute enjoy the benefit of his bargain, but must keep his money or securities in idleness during that period. He, by reason of such law, may suffer damage and loss through the rise or fall of value of the commodities purchased, or of the securities to be paid over or mayhap be cheated out of the fruits of his purchase through the preparation for competition of his business rivals during the dormant period. If it is assumed that the purpose of the statute in question is to protect creditors against loss from fraudulent transfers

of merchandise, it should and ought to fail of that purpose, because its requirements are unequal, harsh, illogical and unreasonable, and because it brands every contract of sale, essentially innocent in itself, as fraudulent, and every honest seller and buyer as dishonest.

PLAINTIFF IN ERROR.

CHARLES F. THAYER,
JOHN J. PHELAN,
His Attorneys.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 265.

JOSEPH A. LEMIEUX,
Plaintiff in Error,

vs.

JAMES M. YOUNG, TRUSTEE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF OF DEFENDANT IN ERROR.

D. G. PERKINS, *Counsel.*

STATEMENT OF CASE.

A judgment was rendered by the Superior Court of Connecticut in favor of the defendant in error, plaintiff in a replevin action against the present plaintiff in error, to retain possession of the goods replevied, constituting the stock in trade of a retail drug store, on the ground that the sale and transfer to him by the bankrupt of whose estate the defendant in error is trustee was void as to the creditors and so as to the trustee because no notice of the intention to make said sale was made and recorded as required by Chapter 72 of the Public Acts of 1903 of Connecticut.

The only question open to the plaintiff in error on this appeal is the Federal question raised by him that said statute is unconstitutional because violating §1 of Article 14 of the Constitution of the United States.

The following is the law as it originally was in the revision of 1902:

"§4868. SALE BY RETAIL TRADER OF ENTIRE STOCK AT ONE TRANSACTION. Whenever one who makes it his business to buy commodities and sell the same in small quantities for immediate consumption for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, such sale or assignment shall be made in writing, describing the property so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, shall be acknowledged before competent authority, and recorded within one day after the time of such sale, assignment, or delivery, in the town clerk's office in the

town where the vendor has his place of business; but Sundays and legal holidays shall be excluded in the computation of such time.

§4869. SUCH TRANSACTION VOID WHEN. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of §4868 shall be void as against all persons who were creditors of the vendor at the time of such transaction."

Section 4868 was amended by Chapter 72 of the Public Acts of 1903, as follows:

"CHAPTER 72.

An Act concerning the Transferring of a Person's Business.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 4868 of the general statutes is hereby amended to read as follows: No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto."

The effect of this amendment, however, is not to prohibit such sales absolutely but simply to make them void as against

the vendor's creditors at the time of sale, for this amendment simply substitutes a section for 4868, but still leaves it in connection with and modified by Section 4869.

The revision of 1902 was enacted as the general statutes of the State by an act approved June 11th, 1901, and found on Page 1183 of the General Statutes of Connecticut, revision of 1902, the first section of which is as follows:

"Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. The revision of the general statutes of this state, as made by the commission heretofore appointed for that purpose and reported to this general assembly, is hereby adopted, with the public acts enacted during the present session, as the public statute laws of this state, to take effect as hereinafter specified."

So that the provision that such sales shall be void as to creditors, found in a later amendment, Chapter 211 of the Public Acts of 1905, was not necessary to accomplish that result as such was already the law, and the Supreme Court of Connecticut in the present action (See opinion, Page 22) has so construed the law.

Under the act, then, to make a sale good as to his creditors, the vendor is bound, not less than seven days previous to such sale, to cause to be recorded in the town clerk's office a written notice of his intention to make such sale, describing in general terms the property and all conditions of the sale and the parties thereto.

A sale is perfectly good between the vendor and vendee and passes title so far as they are concerned, and the only restriction on the freedom of sale is the written notice to be recorded seven days prior thereto.

If the vendor owes no debts the notice can be safely omitted or he can arrange to pay his debts or to protect the vendee against them, and the provisions of the law are not in practice burdensome.

So far as the written notice itself is concerned there are no burdensome restrictions, and it is as simple as any notice could be, so that if the legislature has power to require any notice, it can this notice, and if it can require a notice of an intended sale at any date prior to the sale, the time is surely not unreasonable, for it is only one week and the difference between one day, the least notice, and one week, is not so great that it can be said the legislature has exceeded its constitutional authority in fixing an unreasonable time. The time is no more than reasonably necessary to get notice to creditors of the intended sale of the property, which in almost all cases where debts exist, the creditors have themselves furnished the debtor on credit.

The need or wisdom of such legislation is a matter of legislative discretion, and this court will not consider that question.

"If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary."

Powell vs. Penn., 127 U. S., 685.

This act was clearly within the police power of the State under the reasoning and within the decisions cited by the Court in its opinion.

Statutes upon the same subject, but with much more rigorous and burdensome conditions, have been held to be constitutional.

Squire & Co. vs. Tellier, 185 Mass., 18.

The New York statute held to be unconstitutional in Wright vs. Hart, 182 N. Y., 330, relied upon by the plaintiff in error, provided much more rigorous and burdensome conditions than the Connecticut statute in question, and the Court was divided even in that case on the question of unconstitutionality.

A familiar illustration of a restriction and delay until notice published, in the right to execute a contract, is found in the early Connecticut statutes (Stat. 1784, Page 135), providing that no persons should be joined in marriage before the purpose or intention to do so had been sufficiently published in some public meeting or congregation on the Lord's day, or such purpose or intention be set up in fair writing upon some post or door in the meeting house or near the same in public view, there to stand so as it may be read eight days before such marriage.

And the more modern laws of the different states requiring certain information to be furnished and a license procured before executing a contract of marriage are also a restriction and delay upon the right of contract, but clearly within the police power of the state for the public good.

The fact that property may be destroyed through the enforcement of a statute and the right of contract either prohibited or restricted, is not decisive on the question of constitutionality.

In

Frisbie vs. U. S., 157 U. S., 165,

the Court say: "While it may be conceded that generally speaking among the inalienable rights of the citizens is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right

to contract for the purchase of lottery tickets; to the minor the right to assume any obligations except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and indeed may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in one manner conflicts with the proposition that generally speaking every citizen has a right freely to contract for the price of his labor, services, or property."

Soon Hing vs. Crowley, 113 U. S., 709.
Booth vs. Illinois, 184 U. S., 429.
Otis vs. Parker, 187 U. S., 606.
Jacobson vs. Massachusetts, 197 U. S., 27.
Ah Sin vs. Williamson, 198 U. S., 500.
Reduction Co. vs. Sanitary Works, 199 U. S., 318.

Legislative acts under the police power must necessarily be oppressive, work hardships, and either interfere with or destroy rights of property and the right to contract, and the only principle upon which this Court will act and declare a statute unconstitutional is when the Court can reach and is forced to the conclusion that the statute "enacted professedly to protect the public morals has no real or substantial relation to that object but is a clear, unmistakable infringement of rights secured by the fundamental law."

In

Reduction Co. vs. Sanitary Works, 199 U. S., 318, this Court said: "Equally well settled is the principle that if a regulation enacted by competent public authority avowedly for the protection of the public health, has a real substantial relation to that object, the Courts will not strike it down upon grounds of merely public policy or expediency. Railroad Co. vs. Husen, 95 U. S., 465, 470, 471); Mugler vs. Kansas, 123

U. S., 623, 661; Lawton vs. Steele, 152 U. S., 133, 136; Atkins vs. Kansas, 191 U. S., 207, 223; Jacobson vs. Mass., 197 U. S., 11, 27."

And even in considering this question the benefit of the doubt is always given to the constitutionality of the statute.

In

Otis vs. Parker, 187 U. S., 608,

this Court said: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible conditions which this Court can know but imperfectly if at all."

The purpose of the Legislature in passing the statute in question was to prevent fraud on the part of retail dealers in suddenly and secretly selling out at wholesale in one transaction their entire stock in trade, and to protect the creditors of such a dealer, who in all probability had supplied him the stock, by requiring him to give one week's public notice of such intended sale by recording a written notice. This requirement of recording notice surely has a real, substantial relation to the purpose of the statute and is calculated to accomplish the end desired.